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82-1860

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SCHNEIDER MOVING & STORAGE COMPANY,
Petitioner,

v.

LORAN W. ROBBINS, MARION N. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD MCDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States and Southeast and Southwest Areas Pension Fund, a pension trust,
Respondents,

and

LORAN W. ROBBINS, MARION N. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD MCDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States and Southeast and Southwest Areas Health and Welfare Fund, a health and welfare trust,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DAVID F. YATES, ESQ.
7711 Carondelet, Suite 500
St. Louis, Missouri 63105
(314) 727-7676
Counsel for the Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

The sole question presented is:

May the Trustees of employee welfare and pension trusts, which have been established as third-party beneficiaries of collective bargaining agreements between employers and labor unions under §302(c) of the Taft-Hartley Act (29 U.S.C. §186(c)), file suit against an employer for allegedly delinquent contributions before exhaustion of the grievance and arbitration procedure under the agreements, where:

1. There is an underlying question of coverage requiring interpretation of the collective bargaining agreement, and

2. The collective bargaining agreement requires that such questions be resolved through the grievance and arbitration procedure of the agreement.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner Schneider Moving & Storage Company[1] respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 16, 1983.

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[1] Prosser Moving and Storage Company has also filed a petition for certiorari in a different but related case.

OPINION BELOW

The opinions of the Court of Appeals (*Robbins, et al.* v. *Schneider Moving & Storage Company*, 673 F.2d 246 (8th Cir. 1982) and *Robbins, et al.* v. *Schneider Moving & Storage Company*, 700 F.2d 433 (8th Cir. *en banc* 1983)) are contained in Appendixs B and C attached hereto. The Memorandum and Order of the District Court for the Eastern District of Missouri appears in Appendix A attached hereto.

JURISDICTION

Judgment of the Court of Appeals for the Eighth Circuit was entered on March 24, 1982. A timely Petition for Rehearing en banc was granted on June 4, 1982. The judgment of the Court of Appeals for the Eighth Circuit, *en banc*, was entered on February 16, 1983, and this Petition for Certiorari has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Trustees of the Central States Health and Welfare and Pension Funds (hereinafter referred to as "Trustees") brought suit on April 21, 1980, against Schneider Moving & Storage Company ("Schneider") alleging that Schneider had been a party to a series of collective bargaining agreements with Teamsters Local Union 610 and that under those collective bargaining agreements it was required to make contributions to the funds on behalf of "each employee covered by said agreement." (See Appendix D) Suit was filed in the United States District Court for the Eastern District of Missouri. Jurisdiction was alleged under Section 301(a) of the Labor Management Relations Act of 1947 as amended (29 U.S.C. §185(a)); and Section 502 of the Employee Retirement Security Act of 1974 (29 U.S.C. §1132). Scneider moved to dismiss on the ground that the collective bargaining agreements provided that it was obligated to make contributions to the funds on behalf of "each

regular employee" and not on behalf of all of its employees. Schneider moved to dismiss on the ground that the District Court lacked jurisdiction over the subject matter because the dispute required an interpretation of the collective bargaining agreement to determine which types of employees were covered by Schneider's obligation to contribute to the Fund—a "coverage" issue. Schneider contended that it and the union representing its employees had contractually agreed that such issues would be raised and resolved through the grievance and arbitration procedure contained in the collective bargaining agreement and, therefore, the Court lacked subject matter jurisdiction over the Complaint. The union had not claimed that certain types of employees, i.e., casuals, part-time, temporary, extra, seasonal and emergency, were covered by Schneider's obligation to contribute. Therefore, Schneider argued that unless and until the union raised the issue of coverage under the contractual grievance and arbitration procedure by contending that Schneider had not made required contributions, the Trustees could not bring suit to collect contributions allegedly due from Schneider for these employees.

On November 17, 1980, the Honorable John K. Regan, Senior District Judge, granted Schneider's Motion to Dismiss.

The District Court held that the claims asserted in the Complaint against Schneider could not be characterized as a simple collection matter. The Court found that the underlying dispute was one involving construction and interpretation of contract language and that therefore the issues fell within the scope of the grievance and arbitration clause of the collective bargaining agreement.

The Trustees appealed the decision of the District court to the United States Court of Appeals for the Eighth Circuit. On March 24, 1982, the Court of Appeals reversed the decision of the District Court and remanded the case for further proceedings.

On April 7, 1982, Schneider filed its Petition for Rehearing *en banc* in the United States Court of Appeals for the Eighth Circuit. The Court of Appeals granted Schneider's Petition for Rehearing *en banc*.

On February 16, 1983, in a six to two decision, the Eighth Circuit Court of Appeals, while noting a conflict among the Circuits, overruled the District Court and several prior decisions of the Eighth Circuit and remanded the case for further proceedings.

REASONS FOR GRANTING THE WRIT

This Is A Case Of First Impression Involving Important Questions Of Federal Labor Law, National Labor Policy, And Employee Benefit Law. The Decision Below Is In Direct Conflict With Decisions Of Three Other United States Courts Of Appeals And With Federal Labor Law, National Labor Policy, And Employee Benefits Law Favoring Arbitration As A Method Of Resolving Disputes.

Introduction

The decision below, by the Court *en banc* is one of first impression in the United States Supreme Court. The case presents an important question involving Federal labor law, national labor policy and employee benefits law. This question is: May the Trustees of employee welfare and pension trusts, which have been established as third-party beneficiaries of collective bargaining agreements between employers and labor unions under §302(c) of the Taft-Hartley Act (29 U.S.C. §186(c)), file suit against an employer for allegedly delinquent contributions before exhaustion of the contractual grievance and arbitration procedure, where:

1. There is an underlying question of coverage requiring interpretation of the collective bargaining agreement, and

2. The collective bargaining agreement requires that such questions be resolved through the grievance and arbitration procedure of that agreement.

The decision below conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980). The decision also conflicts with the decision of the United States Court of Appeals for the Sixth Circuit in *Central States Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport, Inc., et al.*, 698 F.2d 802 (6th Cir. 1983). Finally, the decision

below conflicts with the decision of the United States Court of Appeals for the Fourth Circuit in *Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Health Center,* 669 F.2d 212 (4th Cir. 1982).

The decision below also conflicts with national labor policy which favors arbitration as the preferred means of resolving disputes involving collective bargaining agreement interpretation questions. This policy was enunciated in the Steelworkers Trilogy: *United Steelworkers* v. *Enterprise Wheel and Car Corporation,* 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior and Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564 (1960).

This policy is also reflected in §302(c) of the Taft-Hartley Act (29 U.S.C. §186(c)) which requires that arbitration be used to resolve deadlocks between trustees of multiemployer employee benefit plans such as those involved in this case.

Finally, the decision below conflicts with the national policy relating to employee benefit law that requires arbitration for the resolution of disputes involving the liability of employers for withdrawing from multiemployer pension plans. See §4221 of the Employee Retirement Income Security Act of 1974 as amended by the Multiemployer Pension Plan Amendment Act of 1980 (29 U.S.C. §1401).

Discussion of Conflicts

The Seventh Circuit Court of Appeals ruled on the precise issue before the Court in the present case. In *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.,* 625 F.2d 171 (7th Cir. 1980), the language contained in the collective bargaining agreements was nearly identical to the language in this case. There, as here, the funds filed a collection suit against the employer seeking contributions claimed to be owed under the terms of the collective bargaining agreement. The employer moved to dismiss, alleging absence of subject

matter jurisdiction because the arbitration provisions contained in the collective bargaining agreement had not been exhausted. The District Court granted the motion to dismiss and the Seventh Circuit Court of Appeals affirmed, ruling that:

> We agree with the Funds, as does Martin, that the Funds are not required to arbitrate disputes over delinquent payments. However, Judge Nolan was correct in finding that this is not a simple collection case, but a case turning on which, if any, of the disputed workers were covered by the contract. Until that question is resolved, it is impossible to determine whether there is any delinquency on which to base a collection action under Articles 60 and 61. The parties to the contract clearly intended, as reflected in their inclusion of Article 8, that such questions of contract interpretation be resolved by arbitration.

Central States, Southeast and Southwest Areas Pension Fund v. *Howard Martin, Inc.*, 625 F.2d at 172. The Funds argued that they had no access to the arbitration process. The Court answered that:

> The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interest, to file a grievance against Martin.

625 F.2d at 173.

The Fourth Circuit had occasion to address this same issue in *Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Health Center*, 669 F.2d 213 (4th Cir. 1982). In *Constant Care*, the Court of Appeals reversed the District Court's dismissal of the Funds' complaint. The Court adopted the reasoning of *Howard Martin*, but ruled that the case before it was a mere collection case to which

no substantive defenses had been asserted by the employer. The Court, quoting Judge Nolan in *Howard Martin,* stated that where the case involves a dispute arising out of an interpretation of the contract and the contract calls for arbitration of such disputes, the case must first be submitted to arbitration.

The Court went on to hold that:

> As the quoted passage from Howard Martin discloses, the rationale of that decision was that the case was not a simple collection matter; rather, there was an underlyng question of contractual interpretation warranting arbitration which was a prerequisite to collection.

Trustees of National Benefit Fund for Hospital and Health Care Employees v. *Constant Care Community Health Center,* 669 F.2d at 215.

In *Central States, Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport, Inc., et al.,* 698 F.2d 802 (6th Cir. 1983), the Trustees brought suit seeking a preliminary injunction to require the employer to provide the funds with certain information with respect to all the employees of the employer. The Sixth Circuit Court of Appeals held that neither ERISA's statutory disclosure provisions nor contractual provisions entitled the funds to conduct such a broad inspection of records. The Court held that there was a limited right to inspect employee records, which was limited to "factual situations in which the Trustees have reasonable cause to believe that a particular person is covered by a collective bargaining agreement but has not been placed on the Union seniority list or otherwise classified by Transport or the Union as a covered employee." *Central States Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport. Inc., et al.,* 698 F.2d at 811.

The Court in so holding described the means by which the status of a group of employees ("covered" or "non-covered") was to be determined. The Court held that:

> Entitlement to Funds' benefits may be established by a concession amongst the parties that a particular individual is a covered employee or person otherwise entitled to the Funds' benefits. Entitlement may also be established by the judicial or arbitral process where there is no concession that an employee, or one claiming under him or her, is a covered employee.

Central States Southeast and Southwest Areas Pension Fund, et al. v. *Central Transport, Inc., et al.*, 698 F.2d at 811.

The clear holding of the Court is that where the collective bargaining agreement dictates the method of determining coverage, that method must be followed in order to determine whether a particular employee or group of employees is in fact "covered." The entire import of the Sixth Circuit's decision in *Central Transport, Inc.*, is that the Trustees are bound by the terms of the collective bargaining agreement which created the funds so long as they are consistent with the statute.

In this case the collective bargaining agreement in Article VI (see Appendix D) requires that disputes as to the meaning or application of the provisions of the collective bargaining agreement be arbitrated.

To summarize the above, prior to the decision of the Court below, all of the Court of Appeals which had ruled on this issue had ruled that where there is a genuine dispute involving the interpretation of the terms of the collective bargaining agreement, such dispute must be decided by arbitration, prior to any action to collect such contributions. The rationale for all these decisions was that no right to collection can be determined by a Court contrary to the terms of the document that created that right. The Courts rightly recognized that where the existence of the obligation to make certain payments *depends* upon the interpretation of the collective bargaining agreement and the collective bargaining agreement specifically requires arbitration on questions of interpretation, the Court must defer to arbitration.

The Court below relied on several cases which have little relevance to the present case. The Court relied heavily on *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459 (1960). In that case the Supreme Court held that an employer could not set off against a third-party beneficiary welfare fund, a claim the employer had against the union. In reaching its decision the Court observed that a welfare and retirement plan established under §302(c) of the Taft-Hartley Act was not a typical third-party beneficiary. The case is clearly and significantly distinguishable. As stated in *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171, 172 (7th Cir. 1980):

> In Lewis, however, the employer's liability for payments to the Fund was conceded, the case dealt with the employer's claimed right to withhold payments and setoffs of damages, and no arbitration clause was present in the contract or discussed by the Court. Whether the Funds' special third party status would require a specific provision entitling an employer to set off payments admittedly owed is irrelevant here, where the existence of the obligation to make certain payments depends upon the interpretation of the contract and the contract specifically requires arbitration on questions of interpretation.

Thus, in *Lewis*, there was no underlying contract dispute and no mention of any arbitration clause. Therefore, the *Lewis* case has no applicability here.

The Court below also relied on §515 of ERISA (29 U.S.C. §1145) and its legislative history. That section provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Regarding §515, the Court quoted from *Kaiser Steel Corporation* v. *Mullins*, 455 U.S. 72 (1982).

> The provision which was eventually enacted as [§515] was added to S. 1076 by the Senate Committee on Labor and Human Resources. The Committee explained that the provision was added because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions," and steps must be taken to "simplify delinquency collection." Senate Committee on Labor and Human Resources, S. 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 44 (Comm. Print Apr. 1980) (1980 Senate Labor Committee Print) (emphasis added). During floor debate, Senator Williams and Representative Thompson explained the purpose and meaning of [§515] in the same language used in the Senate Labor Committee Print.

Kaiser Steel Corporation v. *Mullins*, 455 U.S. at 87.

The Court below went on to state that the reference to "simple collection actions" in the legislative history is striking in light of the *Howard Martin* court's use of the same phrase. However, *Howard Martin* was rendered after the legislative history was written. §515 was not enacted in response to *Howard Martin*. In addition, it is clear that the arbitration procedure to be used in resolving coverage disputes is perfectly consistent with and supportive of §515 of ERISA. By requiring that coverage disputes be subjected to arbitration, the true collection actions would be just that—collection actions, and not long-winded and complex interpretations of collective bargaining agreements. By following the contractual provisions set forth, the coverage disputes would be resolved before any court would become involved. In fact, the Court of Appeal's reliance on

§515 is totally incongruous with the rest of the decision. By allowing funds to litigate the coverage issues in court without exhaustion of the contractual arbitration procedure, the federal courts will be burdening themselves with questions of contract interpretation. There will be no such thing as a simple collection action; there will only be the "lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions"—just the problem §515 is intended to eliminate.

The decision reached is also contrary to the national labor policy strongly favoring arbitration, as articulated in the Steelworkers Trilogy. See *United Steelworkers* v. *Enterprise Wheel and Car Corporation,* 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior and Gulf Navigation Company,* 363 U.S. 574 (1960); *United Steelworkers* v. *American Manufacturing Company,* 363 U.S. 564 (1960). As Judge Henley stated in his dissenting opinion to the panel decision of the Court of Appeals in this case:

> Because I find it clear that arbitration here would promote the national labor policies of maintaining industrial peace, avoiding delay, and deferring to the expertise of persons well acquainted with the standards of the industry and the law of the shop, and because I think deferral to arbitration would not significantly undermine the independence of the Trustees, I would affirm the judgment of the district court.

(Appendix B) (Panel Op. page A-15). *See also, IBEW Local No. 308* v. *Dave's Electric Service, Inc.,* 382 F.Supp. 427 (M.D. Fla. 1974).

The majority in the panel below stated that they were aware that allowing the District court to interpret the provisions of the collective bargaining agreement might lead to a lack of uniformity in interpretation of the bargaining agreements. They also stated that such a danger would be "minimal." (Panel Op. page A-14) (Appendix B) This raises a very important question.

Schneider, of course, is greatly concerned that litigating coverage issues with the Trustees, when the Union has not raised these issues could result in Schneider being compelled to make payment to the Trustees in excess of the obligation it assumed. To compel Schneider to litigate this issue is far beyond its expectations and contrary to its agreement. The other side of the coin is that Schneider could be bound to less than what it originally believed its contractual obligation to be. In that case, it would not be Schneider, but the beneficiaries of the plans who would suffer. Litigating the interpretation and construction of the contract without the presence of the union poses many possibilities. The Union could not join in any action with the Trustees in federal court because the Union would first have to arbitrate the subject dispute under the contractual arbitration procedure. The employees could not join in the dispute because they agreed to bargain and resolve disputes through the Union. If the employees were allowed to join in the suit, the collective bargaining system would be circumvented and undermined.

The Court of Appeals opinion states that:

> The Union may choose to assist the funds by invoking [the arbitration] process. Our holding in no way obstructs that alternative avenue of redress. Nor need we decide in the cases before us now to accommodate the judicial and arbitral processes and their results if both are invoked with respect to the same pension or welfare claim.

(Op. page A-37). (Appendix C) The Court below notes, in footnote 9, that "[t]here may be some danger that courts will interpret agreements in a way different from arbitrators."

The opinion of the Court below seems to scoff at the danger that there will be conflicting decisions. It first states that the Union may decide to assist the funds by invoking the arbitration process but allows the funds to refuse to participate in that process. This Court should consider the implications of this decision in a case where the Union seeks arbitration on a given

coverage point but where the fund refuses to go along and instead files suit with respect to the same coverage issue. If both tribunals decided the issue the same way, there would be no problem. However, if the tribunals' decisions differed, which would prevail? If the Court's decision prevailed, the policy favoring arbitration in the national labor policy would be undermined. If the arbitrator's decision prevailed, the whole exercise of allowing the Trustees to litigate instead of compelling them to arbitrate as they are contractually required to do, would be defeated. If neither decision prevailed, the employer would have inconsistent obligations under the same contract with respect to the same employees.

Thus, the decision by the Court of Appeals in this case is frought with dangers and it is doubtful that either employers or unions that are party to collective bargaining agreements would be willing to call these dangers minimal.

The Court of Appeals overruled three well-reasoned decisions of the panels of the Eighth Circuit, *Layne-Western Co., Inc.* v. *International Union of Operating Engineers,* 650 F.2d 155 (8th Cir. 1981); *Farmer* v. *Fisher,* 586 F.2d 1226 (8th Cir. 1978); and *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST,* 641 F.2d 616 (8th Cir. 1981). In doing so, the majority opinion clearly holds that underlying contractual interpretation and construction defenses may be raised in an action which is termed by the fund as a "collection action." Where an employer has a defense based on interpretation of the collective bargaining agreement, the court will have to consider that defense to determine whether the amounts allegedly due to the funds are actually due to the funds. This will be a routine defense in many cases since many "collection actions" in fact involve gray areas where coverage is or may be unclear.

the process advanced by the decision in this case clearly circumvents the national labor policy favoring arbitration and will very probably create, as discussed above, inconsistent and incongruous interpretations of collective bargaining agreements.

In addition to the foregoing, the Court of Appeals expressed concern that the independence of the Trustees would be jeopardized if exhaustion of the contractual grievance and arbitration procedure were required. However, this concern for the independence of the Trustees is not justified. The fact that arbitration would require the Trustees to rely on the union to invoke the arbitration procedure, was addressed by the Seventh Circuit in *Central States, Southeast and Southwest Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980). In that case the Court held that:

> Lastly, the Funds say they have no access to the arbitration process because Article VII of the contract provides that arbitration may be invoked "only by the authorized union representative or by the employer." The argument falls of its own weight, however. To trigger the arbitration process, the fund need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interest, to file a grievance against Martin.

Id., 625 F.2d at 173. In addition to the foregoing, a panel of the Eighth Circuit in *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981), noted that:

> [I]t would appear that in the event a dispute should arise respecting coverage, the duty of fair representation would impel the Union to invoke the grievance machinery if the Funds were to request such action.

Id. at 618. See also Judge Henley's dissent in the decision below. (Dis. Op. pages A-37-41) (Appendix C). That same duty of fair representation would certainly extend to require the unions to invoke that machinery with due diligence for the protection of the employees' rights.

Additional protections are available to insure that the rights of the Trustees and the employees are protected. First, if there was any reasonable basis for believing that the employer failed to report any covered employee, the Secretary of Labor would have the power to make an investigation and to make available to the Trust any information resulting from the investigation. 29 U.S.C. §1134(a)(1) and (2). Second, criminal sanctions are available in the event the employer knowingly fails to disclose facts required by ERISA to be published. 18 U.S.C. §1027. Third, as stated by Judge Henley in his dissent to the panel decision in this case: "The independence of the trustees is already adequately protected by the mandates of the LMRA and ERISA." (Dis. Op. page A-40) (Appendix C).

The decision below is also directly contrary to the express policy of Congress that disputes involving the rights and obligations of those involved in multiemployer benefit plans be resolved through arbitration. This policy is clearly stated in §302(c) of the Taft-Hartley Act (29 U.S.C. §186(c)), which requires, *inter alia*, that any trust agreement establishing a joint labor-management administered employee benefit fund provide that:

> . . . in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock . . . the two groups shall agree on an impartial umpire to decide such dispute. . . .

The Congressional policy favoring arbitration as a means of resolving disputes in this area is also expressed in §4221 of the Employee Reitrement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (29 U.S.C. 1401). This section of ERISA requires that the resolution of disputes involving the liability of employers withdrawing from multiemployer pension plans be resolved through arbitration. It provides, *inter alia*,

> Sec. 4221(a)(1). Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 [relating to the determination and calculation of the withdrawal liability] shall be resolved through arbitration.

As stated by Judge Henley in his dissent to the decision of the Court below:

> Today the court makes bad law. It unnecessarily overrules three prior decisions of this court, rejects the reasoning of the Seventh Circuit in *Martin* and erodes the pronouncements of the Supreme Court in the *Steelworkers Trilogy*. Its decision may be perceived as doing disservice to the national policies of maintaining industrial peace, avoiding delay and deferring to the expertise of persons acquainted with industry standards and the law of the shop. (Dis. Op. pages A-37-38) (Appendix C)

CONCLUSION

In summary, the decision of the Court of Appeals in this case is contrary to the decision of the Fourth, Sixth and Seventh Circuits, is contrary to the weight of the law and unsupported by present law, is contrary to the national labor policy and employee benefits law and plicy, and it unnecessarily assumes that the independence of the Trustees will be jeopardized by a contrary decision. For these reasons, Petitioner Schneider Moving & Storage Company respectfully requests that the Court grant its petition for writ of certiorari to review the decision of the Court below and to resolve the conflict among the circuits with regard to this question.

Respectfully submitted,

By: David F. Yates, Esq.
7711 Carondelet, Suite 500
St. Louis, Missouri 63105
(314) 727-7676
Counsel for Petitioner

5/12/83

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-535C (B)

Loran W. Robbins, et al.,

Plaintiffs,

vs.

Schneider Moving and Storage Company, Inc.,

Defendant.

MEMORANDUM

(Filed November 7, 1980)

In this action, the trustees of two separate and independent trusts, as alleged third-party beneficiaries, have joined in a single count their separate claims alleging that defendant has violated the terms of three consecutive three-year collective bargaining agreements, commencing March 1, 1970, as well as certain provisions of their separate industry Trust Agreements.

In substance, it is alleged in Paragraph 10 of the complaint that "(b)y virtue of [unspecified] provisions contained in the Collective Bargaining Agreements", defendant agreed, inter alia, to furnish to the trustees of each of said Funds a monthly contribution report. In Paragraph 11 of the complaint, it is alleged in general terms that "(p)ursuant to [unspecified] provisions contained in the Collective Bargaining Agreement *and* Health and Welfare *and* Pension Trust Agreements, the Trustees acting thereunder are authorized and empowered to examine and copy the payroll books and records of an

Employer", with certain alleged consequences if "upon an audit made by the Trustees and/or upon other evidence it shall be found that an Employer had failed to make all contributions required" of said employer. Paragraph 12 alleges that defendant has violated said obligations on its part by failing to allow the Trustees "to make *proper* audit of Defendant's payroll books and records" and by failing to make the required monthly contribution reports. Plaintiffs seek specific performance of all of defendant's obligations required under all the agreements, including certain participation agreements.

By pleading their claims in one count in the foregoing manner, plaintiffs have made it extremely difficult, if not impossible, to ascertain which provision of which Agreement has allegedly been violated by defendant as to each set of plaintiff trustees. Adding to this problem, although not adverted to in the complaint, is the fact that although both claims have their genesis in the same collective bargaining agreements, the provisions relating to each Fund and contributions thereto are set forth separately, each being completely independent of the other. So, too, each of the Trust Agreements is entirely independent of and wholly unrelated to the other. We also note that without regard to the foregoing, plaintiffs have served a request for admissions which, inter alia, requested defendant to admit that by the execution in March, 1961, of a so-called "Participation Agreement" which was expressly limited to the *Pension Fund* and the *Pension Trust Agreements* defendant also agreed to be bound by the terms of the *Health and Welfare* Trust Agreements.

Defendant has moved to dismiss the action, contending that the controversy should have been submitted to arbitration. Plaintiffs argue that as third-party beneficiaries as distinguished from signatories to the Collective Bargaining Agreements they are not bound by the grievance-arbitration procedures which would be required of the union with respect to the resolution of differences.

This issue has been addressed in several cases, most recently in *Central States Southeast and Southwest Areas Pension Fund* v. *Martin*, ____ F.2d ____, 104 LRRM 3096, decided by the Court of Appeals for the Seventh Circuit on July 9, 1980, discussed infra. Plaintiffs cite some earlier district court decisions in Illinois and one in Pennsylvania (e.g. *Todd* v. *Caseworkers*, 425 F. Supp. 1375) to the effect that where the only dispute relates to how much of the required contribution is delinquent, the pension plan trustees as third-party beneficiaries are not bound to submit the dispute to arbitration. In those cases the resolution of the dispute was not dependant on the construction or interpretation of the language contained in the collective bargaining agreement. We agree that where, as in *Todd*, the action is no more than a simple collection proceeding with only the amount of the delinquency in issue, the third-party beneficiary is not required to arbitrate such dispute.

Of importance is the fact that the present is *not* a simple collection case. To the contrary, defendant points out, and plaintiffs have not denied, that whether defendant will ultimately be held liable to either or both Funds is dependent upon a construction and interpretation of the language of the collective bargaining agreements. It was on this basis that *Martin, supra,* was decided. In holding that the dispute should be submitted to arbitration, Judge Markey, for the Seventh Circuit, noted that inasmuch as the case turned on which, if any, of the disputed workers were covered by the contract, it would be impossible to determine whether there was, in fact, a delinquency on which to base a collection action.

Plaintiffs rely on *Lewis* v. *Benedict Coal Corp.*, 36 [1] (sic) U.S. 459 (1960) which held that a collective bargaining agreement establishing a welfare fund is not a typical third-party beneficiary contract, and on that basis ruled that the employer could not set off against its admitted liability to the fund the damages it sustained by reason of the *union's* breach of a no-strike agreement. No such situation is here present.

On the contrary, the issue here is simply whether the employer is liable at all *under the terms of the collective bargaining agreements.* If, upon a proper construction and interpretation of the agreements, the defendant has not agreed to make contributions on behalf of certain classes of employees, the argument that plaintiffs, as third-party beneficiaries, may attempt to collect on behalf of those employees begs the question. Surely, plaintiffs are not entitled to contributions which the employer has not agreed to make under the collective bargaining agreements. They are third-party beneficiaries *only* to the extent set forth in such agreements. In truth, the underlying controversy as to which employees are covered by the contract is actually with the *union,* and the union should not be permitted by the expedient of remaining out of the litigation, preclude the employer from obtaining a determination, through arbitration, of the proper construction of the contract language.[1]

We hold that the controversy as to the construction or interpretation of the contract language must first be submitted to arbitration. Unless that issue is resolved adversely to the employer, plaintiffs may not maintain this action on the theory they are third-party beneficiaries. Should there be any problem respecting the right of the trustees to independently invoke the arbitration provisions, the procedure suggested by *Martin* should be followed, namely, that the Trustees request the union to file a grievance and thus trigger the arbitration process.

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[1] Significantly, although the collective bargaining agreements expressly provide that a failure by the employer to pay the required contributions shall constitute a breach of the agreements, the union has taken no action. A wilful violation of such agreement, uncured after 5 days notice, entitles the union to use its economic power to enforce the contract. We further note that the agreements obligated the employer to post a list of its regular employees, so that if the union were to question the adequacy thereof, the dispute here involved would long since have been resolved by arbitration.

To make our ruling unmistakably clear - we do *not* hold that *mere* collection matters should be subject to arbitration. We add that in the event the trustees are uncertain as to whether a particular claim is a mere collection matter or one which involves a dispute as to the construction or interpretation of the language of the collective bargaining agreement, they should, before instituting suit, obtain the requisite information from the union and the employer.

It follows from the foregoing that defendant's motion to dismiss should be and it is hereby sustained. An order will be entered dismissing the case without prejudice pending the outcome of arbitration proceedings.

Dated this 7th day of November, 1980.

/s/ JOHN K. REGAN
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-535C (B)

Loran W. Robbins, et al.,

Plaintiffs,

vs.

Schneider Moving and Storage Company, Inc.,

Defendant.

ORDER OF DISMISSAL

The Court having this day entered its MEMORANDUM herein, NOW THEREFORE in accordance therewith and for the reasons therein stated,

IT IS HEREBY ORDERED that this action be and the same is hereby DISMISSED WITHOUT PREJUDICE.

Dated this 7th day of November, 1980.

/s/ JOHN K. REGAN
UNITED STATES DISTRTICT
JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-2116

Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Pension Fund,

Appellants,

v.

Prosser's Moving and Storage Company, a Missouri corporation,

Appellee.

No. 80-2117

Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds,

Appellants,

v.

Schneider Moving and Storage Company, a Missouri corporation,

Appellee.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: September 16, 1981

Filed: March 24, 1982

Before BRIGHT, HENLEY and ARNOLD, Circuit Judges.

PER CURIAM.

These appeals are from the district court's orders dismissing appellants' complaints without prejudice pending the outcome of arbitration proceedings. The gravamen of the complaints is that appellees have failed to accurately report and remit Benefit Fund contributions for all employees covered by various collective bargaining and other ancillary agreements which establish two employee benefit plans. The complaints also prayed, *inter alia*, for an accounting as to the hours worked and wages received by the appellees' employees in order to determine the amounts of employer contributions due to the two Funds, for payment of the amounts determined to be due the Funds, with interest, and for specific performance of the obligations undertaken by the appellees as a result of their execution of the collective bargaining and ancillary agreements.

The underlying dispute involves the interpretation of the definitions of certain classes of employees for contribution purposes. To the extent that these classes are defined, the definitions appear to be set out solely in the collective bargaining agreements.

Appellees denied the allegations contained in the complaints, and each moved to dismiss the complaints on the grounds that the district court lacks subject matter jurisdiction, and that the complaints fail to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b). The thrust of their arguments is that the Trustees have neither a statutory nor a contractual right to the prayed-for relief without prior deter-

mination of their obligations through use of the grievance-arbitration proceedures provided by the collective bargaining agreements.

The district court entered orders dismissing the complaints without prejudice pending the outcome of arbitration proceedings, and this appeal followed. We have jurisdiction over these appeals pursuant to 28 U.S.C. § 1291. *See United Steelworkers of America, AFL-CIO* v. *Black, Sivalls & Bryson, Inc.*, 608 F.2d 303, 304 (8th Cir. 1979).

After a careful examination of the nature of the complaints and of the underlying agreements, we reverse the district court's orders and remand these cases for further proceedings not inconsistent with this opinion.

Appellants are Trustees of the Central States Health and Welfare and Pension Funds. These Funds are employee benefit plans within the meaning of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* (ERISA) and the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.* (LMRA). The Funds are also common law trusts established, respectively, in 1950 and 1955 by written Trust Agreements and Declarations of Trust executed by employer groups whose member companies are engaged in the trucking industry, and by organizations composed of various local Teamsters Unions.

Appellee Schneider Moving and Storage Company (Schneider) is a Missouri corporation engaged in the business of public moving and is an employer and a party in interest in an industry affecting commerce within the meaning of ERISA and the LMRA. From March 1, 1970 through February 28, 1979, Schneider was a party to three successive Master Agreements executed by the Public Movers' Association of Greater St. Louis and Local Union 610 (the Union), affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. In addition, Schneider executed a "Joint Application" and a "Participation Agreement" as re-

quired by the collective bargaining agreements. By executing these documents, Schneider agreed to make contributions to the Health and Welfare Fund, and to the Pension Fund.

In February of 1979, a decertification election was held, and the Union was described as the representative of Schneider's employees.

Appellee Prosser's Moving and Storage Company (Prosser) is a Missouri corporation engaged in the business of public moving, and is likewise an employer and a party in interest in an industry affecting commerce within the meaning of ERISA and the LMRA. From March 1, 1976 through February 28, 1979, Prosser, like Schneider, was a party to a collective bargaining agreement. Prosser also executed a Participation Agreement, whereby it agreed to make contributions to the Pension Fund as required by the collective bargaining agreement. Furthermore, on or about March 1, 1979, Prosser entered into another collective bargaining agreement with the Union, to be effective through February 28, 1982.

The collective bargaining agreements mentioned above provide the definitions whereby a particular employee's eligibility for coverage is determined, and delineate the annual amounts to be contributed by each employer to the Funds on behalf of each of their covered employees. The health and welfare and pension provisions of these agreements further provide that the employer, by executing the agreements, authorizes the execution of the Trust Agreements necessary for the administration of the Funds, and ratifies the actions taken by the Fund Trustees within the scope of their authority.

The collective bargaining agreements also provide a grievance-arbitration mechanism "should differences arise between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of the Agreement." This mechanism gives the Union the discretion to invoke the grievance-arbitration procedures provided by the

agreements, to do nothing, or to use its economic power five days after giving written notice to the employer.

With the exception of the 1979-1982 Collective Bargaining Agreement with Prosser, the agreements do not give the employers the right to invoke the grievance-arbitration procedures in the event of a dispute involving the Funds. The 1979-1982 Collective Bargaining Agreement with Prosser does allow Prosser to request arbitration. In such circumstances, the Union must submit to arbitration and may not resort to economic action unless the dispute to be arbitrated involves Prosser's failure to make contributions to the Funds.

By executing the Participation Agreements, Prosser and Schneider agreed to make contributions to the Pension Fund as required by the collective bargaining agreements. Appellees also agreed to abide by the terms of the Pension Fund Trust Agreement, and to abide by the rules and regulations adopted by the Trustees of the Fund, and by the actions of the Trustees in administering the Fund in accordance with the rules and with the Pension Fund Trust Agreement.

By executing the Joint Application, Schneider made essentially the same agreements with respect to the Health and Welfare Fund.[1]

The Trust Agreements require the employers to remit payments to the Funds in accordance with the terms of the collective bargaining agreements. Among other things, the Trust Agreements authorize the Trustees to promulgate such rules as

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[1] It does not appear that Prosser executed a Joint Application. Prosser concedes, however, that the two trust indentures were incorporated by reference into the collective bargaining agreements that it executed, and that by executing the collective bargaining agreements it had agreed to ratify the actions of the Trustees of the Funds if such actions are within the scope of their authority under the Trust Agreement.

are necessary to facilitate proper administration of the Funds, to demand and collect employer contributions, and to enforce payment of such contributions by taking whatever steps are necessary, including the institution of legal actions, to collect contributions which may be owed to the Funds. The agreements also authorize the Trustees, by their representatives, to examine the employer's records if such examinations are deemed necessary in connection with the proper administration of the Funds.

We observe initially that the collective bargaining agreements provide for arbitration "should differences arise between the Company and the Union or an Employee of the Company." This provision, when read in connection with the Trust Agreement provision which authorizes the Trustees to institute legal actions in order to enforce payment of amounts which may be owed to the Funds, seems to indicate that the parties did not contemplate that the Trustees are required to resort to the grievance-arbitration procedures delineated in the collective bargaining agreements in all cases.[2]

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[2] Appellees argue that by executing the collective bargaining agreements, they authorized only the execution of Trust Agreements necessary to the *administraton* of the Funds. According to this argument, the filing of these claims by the Trustees cannot be properly characterized as a matter of Fund administration, and, consequently, the Trustees' actions are not within the scope of their powers as authorized in the collective bargaining agreements.

This argument is questionable. One cannot seriously contend that the determination of amounts owed to a trust fund is not a matter of trust administration. To the contrary, a trustee may be held to be in breach of his fiduciary duty to a trust if he is not diligent in determining the amounts so owed.

Given that the power to determine the amounts owed to a trust fund is a proper incident of trust administration, the ability to institute legal proceedings to enforce payments of amounts that may be owed would appear to be a necessary concomitant of that power.

This does not, however, necessarily mean that the Trustees' decision as to amounts owed and coverage are dispositive and we do not so decide.

We think this conclusion comports with national labor policy. As the Supreme Court has noted,

> [t]he duties of [a] . . . trustee of an employee benefit trust fund, under § 302(c)(5) of the Act, under principles long ago developed in the courts of chancery, and under the specific provisions of ERISA, are totally alien to . . . [the] activities [of collective bargaiing and the adjustment of grievances].

NLRB v. *Amax Coal Co.*, 101 S. Ct. 2789, 2798-99 (1981). *See Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), wherein the Supreme Court held that the trustees of a fund established under a collective bargaining agreement are not typical third-party beneficiaries of such agreements, and thus are not necessarily subject to the same duties which would normally attach to such beneficiaries.

In addition, the Trustees should not be required to ask the Union to arbitrate this dispute. Such a requirement would, in our opinion, tend to undermine the independence of the Funds from Union control.

> Congress directed that union welfare funds be established as written formal trusts, and that the assets of the funds be "held in trust" . . . . Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity."

NLRB v. *Amax Coal Co.*, 101 S. Ct. at 2794 (citations omitted).

> Congress, in enacting Section 302 of the Labor Management Relations Act (29 U.S.C. § 186) intended that Welfare and Pension Funds established in accordance with that section would be independent of exclusive control by

> the union. Consequently, the failure of an employer to make contributions as required by an agreement is not an arbitrable dispute in the absence of a specific provision in the agreement requiring the Trustees to submit their claims to the arbitration procedure. . . .
>
> Since the Welfare Fund in the instant action was established in accordance with 29 U.S.C. § 186, it is the opinion of this Court that dismissal of the instant action in order to permit the union and the employers to arbitrate the right of the Trustees would be contrary to the intent of Congress in establishing independent Welfare Funds. If the parties to the collective bargaining agreement (the employers and the union) intended that claims for unpaid contributions to the Welfare Fund should be subject to the arbitration provision of the agreement, they should have so stated in unequivocal language.

Wishnick v. *One Stop Food & Liquor Store, Inc.*, 359 F. Supp. 239, 243 (N.D. Ill. 1973), *cited in Todd* v. *Casemakers, Inc.*, 425 F. Supp. 1375, 1378 (N.D. Ill. 1977). *But see Central States Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980).[3]

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[3] In *Howard Martin*, the Seventh Circuit held that simple collection claims need not be submitted to arbitration. That court nevertheless found that arbitration was required because the underlying dispute was characterized as turning on which, if any, of the disputed workers were covered by the collective bargaining agreement. In such circumstances, the dispute was deemed appropriate for arbitration notwithstanding the necessity that the Trustees rely on the Union to trigger the arbitration process. Such reliance was not deemed by the Seventh Circuit to be a significant impediment to the Trustees' independence or to the Trustees' ability to have the dispute resolved. 625 F.2d at 173. *See also Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Center*, ___ F.2d ___ (4th Cir. 1982).

We are aware that our allowing the district court to interpret the provisions of the collective bargaining agreements might, as appellees suggest, lead to a lack of uniformity in interpretation of the bargaining agreements. We are of the opinion, however, that such a danger would be minimal. The district court is, of course, not precluded from considering the reasoning of an arbitration panel that has previously interpreted provisions which are similar to the ones involved here. We feel that this danger, to the extent that it exists, is outweighed by the possibility that the Union might not be diligent in arguing the Trustees' position during arbitration. This possibility could arise, for example, as a result of a conflict between the duty that the Union has assumed by agreeing to arbitrate the Trustees' claims and its duty towards the employees whose other rights might be imperiled by vigorous enforcement of the Trustees' claims. *See Nedd* v. *United Mine Workers of America*, 556 F.2d 190, 210 (3d Cir. 1977). The possibility could also arise where, as is the case with Schneider, the Union no longer represents the covered employees.

In sum, "the national labor policy becomes an important consideration in determining whether the same inferences which might be drawn as to other third-party agreements should be drawn here." *Lewis* v. *Benedict Coal Corp.*, 361 U.S. at 470. As we have previously noted, moreover, Section 302 of the LMRA expreses the intent of Congress to establish and maintain the independence of Welfare Funds. Therefore, in accordance with the rationale of *Lewis* v. *Benedict Coal Corp.*, *supra*, and *NLRB* v. *Amax Coal Co.*, *supra*, we hold that the Trustees should not be obliged to arbitrate these disputes through the Union in the absence of express language to the contrary appearing in the collective bargaining or trust agreements. *See Owen* v. *One Stop Food & Liquor Store, Inc.*, 359 F. Supp. 243, 246-47 (N.D. Ill. 1973); *Boyle* v. *North Atlantic Coal Corp.*, 381 F. Supp. 1107, 1108 (W.D. Pa. 1971). *But see IBEW* v. *Dave's Electric Service, Inc.*, 382 F. Supp. 427, 430-33 (M.D. Fla. 1974).

We have examined the remaining issues presented by the Trustees, and find that they are either meritless or not properly before us. Accordingly, the orders of the district court are reversed, and these cases are remanded for further proceedings consistent with this opinion.

HENLEY, Circuit Judge, dissenting.

With all deference to considerations which have impelled the majority toward reversal, I reach a different result.

This case, not unlike *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 101 S.Ct. 1437, 1442 (1981), involves a tension between two aspects of national labor policy.[1] Because I find it clear that arbitration here would promote the national labor policies of maintaining industrial peace, avoiding delay, and deferring to the expertise of persons well acquainted with the standards of the industry and the law of the shop, and because I think deferral to arbitration would not significantly undermine the independence of the Trustees, I would affirm the judgment of the district court.

Although, to be sure, the LMRA and ERISA reflect a Congressional intent to maintain the independence of Welfare and Pension Funds such as those involved here, there also exists a strong public policy favoring labor arbitration, *see, e.g., United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*,

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[1] In *Barrentine*, the "tension" was between the policy encouraging negotiation and collective bargaining and the national policy, expressed in the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, which guarantees employees specific substantive rights. 101 S.Ct. at 1441. The underlying dispute here does not involve substantive statutory rights, but rather, the Trustees' right to receive employer contributions. This right to contributions arises solely from the provisions of the collective bargaining agreements, and not from those statutes dealing with the independence of trustees or the Fund. Thus, *Barrentine* may be distinguished.

363 U.S. 574 (1960); *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Health Center, Inc.*, No. 81-1318, slip op. at 4-5 (4th Cir. Jan. 28, 1982); *I.B.E.W.* v. *Dave's Electric Service, Inc.*, 382 F. Supp. 427, 430-33 (M.D. Fla. 1974), and arbitrability is ordinarily to be presumed when the parties' dispute arises out of the collective bargaining process. *See Barrentine* v. *Arkansas-Best Freight System, Inc.*, 101 S.Ct. at 1442, and the cases cited therein. *See also I.B.E.W.* v. *Dave's Electric Service, Inc.*, 382 F.Supp. at 430-31.

Where the underlying dispute involves mere collection matters not requiring an interpretation of the terms of collective bargaining agreements, then the policies justifying deferral to arbitration would not be served by such deferral, and arbitration should not be deemed a prerequisite to the Trustees' ability to litigate the dispute in the federal courts. However, where the underlying dispute involves an interpretation of the terms of the collective bargaining agreements authorizing payment of monies to the Funds, labor policy would best be served by requiring arbitration. *Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Health Center, Inc., supra; Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (1980).

As has been observed, the underlying dispute here involves the interpretation of the term "covered employees," a term defined in the collective bargaining agreements only, and not in any of the ancillary agreements. Furthermore, the parties to the agreements have gone to the trouble of outlining detailed procedures to resolve disputes "as to the meaning or application of the provisions of the Agreement[s]." One need not be clairvoyant to foresee that the spirit of negotiation and compromise that forms the basis for such agreements might be seriously

compromised if the parties become aware that the terms of the agreements might be safely ignored or interpreted initially other than through the arbitration machinery.[2]

Furthermore, with respect to considerations of expedition and efficiency, litigation cannot be said to be superior to arbitration. The issue before us now does not go to the merits of the underlying dispute, and, while I do not deny the importance of this issue, I nevertheless observe that its resolution has already operated to delay resolution on the basic dispute by many months.

The majority is disturbed by the fact that arbitration would require the Trustees to rely on the Union to present their arguments. It is said that the independence of the Trustees would be impermissibly undermined if they are to be required to request such assistance.

I think, however, that the independence of the Trustees is already adequately protected by the mandates of the LMRA and ERISA. This case does not involve a situation such as that present in *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977), which involved the failure of the Trustees of an admittedly Union dominated employee benefit fund to enforce contractual rights of the fund, where such enforcement was clearly contrary to the interests of the Union. Rather, this case involves employee benefit funds whose independcence has already been assured through Section 302(c)(5) of the LMRA. While these Funds should, of course, seek to guard their independence, their efforts should not necessarily be given effect

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[2] The underlying dispute involves the classification of temporary and part time workers in an industry which is apparently somewhat seasonal in nature, and which is arguably subject to varying degrees of employment demands at different times during a given season. Resolution of this dispute thus seems uniquely suited to the use of the expertise of an arbitrator having knowledge of the industry.

where the perceived threat to their independence is both hypothetical and unlikely. I find remote the possibility that deferral to the Union for arbitration purposes would actually tend to undermine the independence of the Funds. *Cf. Amalgamated Local No. 55, United Automobile, Aerospace & Agricultural Implement Workers of America* v. *Metal and Alloy Division of Silver Creek Precision Corp.*, 396 F. Supp. 667 (W.D. N.Y. 1975).[3]

Finally, it bears noting that jurisdiction was not forever barred by the district court; rather, it was deferred. In the unlikely event that arbitration is unsatisfactory, the Trustees again may seek appropriate relief by way of litigation.

As stated, I would affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[3] In that case, a Union, rather than the Trustees, used the arbitration mechanism provided by a collective bargaining agreement to seek enforcement of the employer's obligation to contribute to a benefit fund. The issue of the independence of the Trustees of the Fund was not raised, presumably because no threat to their independence was perceived.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 80-2116 and 80-2117

No. 80-2116

Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley, and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Pension Fund,

Appellants,

v.

Prosser's Moving and Storage Company, a Missouri corporation,

Appellee.

No. 80-2117

Loran W. Robbins, Marion W. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley, and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds,

Appellants,

v.

Schneider Moving and Storage Company, a Missouri corporation,

Appellee.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: October 13, 1982

Filed: February 16, 1983

Before LAY, Chief Judge, HEANEY, BRIGHT, and ROSS, Circuit Judges, HENLEY, Senior Circuit Judge, McMILLIAN, ARNOLD, and JOHN R. GIBSON, Circuit Judges, *en banc*.

ARNOLD, Circuit Judge.

These cases present important questions of labor law touching on the rights and obligations of trustees of Taft-Hartley Act pension and welfare funds in disputes with employers over their contributions to the funds. The trustees in these cases filed suits as third-party beneficiaries of the collective-bargaining agreements between the employers and the union. The District Court, relying largely on *Central States, Southeast & Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980), held in both cases that the trustees were obligated by the collective-bargaining agreements to submit their differences to arbitration. A divided panel of this Court reversed, holding that the trustees could sue in the District Court without resort to arbitration. *Robbins* v. *Prosser's Moving & Storage Co. & Schneider Moving & Storage Co.*, Nos. 80-2116, 80-2117 (8th Cir. March 24, 1982) (per curiam). Because that decision appeared to conflict with prior decisions of this Court, we granted rehearing en banc. We now reverse the District Court and overrule those prior decisions to the extent of any inconsistency with this opinion. Our conclusion is that the national pension policy embodied in the Labor

Management Relations Act (LMRA), the Employee Retirement Income Security Act (ERISA), and the Multiemployer Pension Plan Amendments Act (MPPAA), together with the terms of the collective-bargaining agreement and accompanying trust instruments, dictate that these trustees not be bound by the arbitration procedure, which they have no right to initiate.

I.

The facts of these two cases differ somewhat. The plaintiffs are trustees of the Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund, both of which were established pursuant to §302(c)(5) of the Labor Management Relations Act of 1947 (commonly referred to as the Taft-Hartley Act), 29 U.S.C. §186(c)(5). The complaints, which were filed against Prosser's Moving & Storage Company and Schneider Moving & Storage Company, are based on collective-bargaining agreements between the defendants and Local 610 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The complaint in No. 80-2117 alleged that Schneider had been a party to successive collective-bargaining agreements with Local 610 from March 1, 1970, through February 28, 1979, which required Schneider to make certain contributions to the Pension Fund and the Health and Welfare Fund for each employee covered by the agreement.[1] According to the complaint, the agreement required contributions to be made by the fifteenth day of each month and obligated Schneider to furnish the trustees with a monthly contribution report containing the names of and hours worked by each employee and the contributions required on behalf of each. The plaintiffs further claimed authorization under the collective-bargaining agreements and the trust agreements to audit the employer's records to deter-

[1] Jurisdiction was alleged under §301 of LMRA, 29 U.S.C. §185(a), and §502 of ERISA, 29 U.S.C. §1132.

mine if all required contributions had been made. Schneider was alleged to have violated the agreement by refusing to allow the trustees to audit its payroll records, by failing to furnish the required monthly report, and by repeatedly failing to submit the monthly reports and payments on their respective due dates. Designated Record (D.R.) 3-5. The trustees prayed for an accounting and for all sums determined to be due, together with costs and attorneys' fees as provided in the agreements. D.R. 6-7. The complaint in No. 80-2116 against Prosser was almost identical.

The cases seem to differ in two respects: In February of 1979, a decertification election was held at the Schneider Company, and the Union was decertified as the representative of Schneider's employees. Second, as to the defendant Prosser the real controversy seems to revolve around the trustees' right to conduct an audit of the company's records. Schneider has already submitted to an audit. Schneider has sought to emphasize that its dispute with the plaintiffs is a question of coverage of some employees under the agreement, not the right of the plaintiffs to conduct the audit.

The defendants moved to dismiss both actions on the ground that the controversy should have been submited to arbitration under the terms of the collective-bargaining agreements. The District Court, relying on *Central States* v. *Howard Martin, supra,* agreed with the defendants and dismissed both complaints without prejudice pending the outcome of arbitration. The Court's opinion accepted *Howard Martin's* dichotomy of such suits into "simple collection matters," for which arbitration is not a prerequisite to suit, and more complex actions requiring interpretation of the collective-bargaining contract, in which arbitration is required. Both suits were found by the District Court to involve questions of coverage of certain employees under the agreement and therefore held to present questions of contract interpretation.

II.

Defendants' argument for compulsory arbitration is based on provisions in the collective bargaining contract, on the national labor policy favoring arbitration embodied in the *Steelworkers Trilogy*,[2] and on precedent. Close examination reveals that none of these supports will bear the weight of the defendants' position. Moveover, other important considerations, which we will discuss presently, militate against requiring arbitration.

A.

First, Prosser and Schneider contend that since the plaintiffs sue as third-party beneficiaries of the union contract, they should be bound by the grievance-arbitration procedures contained in the contract. The argument is based on traditional notions of third-party-beneficiary contract law: The third party seeking to enforce the agreement is bound by the terms of the contract and subject to the same defenses as the original promisee would be. Defendants are correct as a general proposition that "[t]he promisor may . . . usually assert against the beneficiary any defense which he could assert against the promisee if the promisee were suing on the contract." Calamari & Perillo, *Contracts* 623 (2d ed. 1977). This rule is, however, not without exception, and the Supreme Court has held collective-bargaining agreements to be such an exception. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), was a suit by pension-fund trustees seeking to compel an employer to contribute to the fund. The issue before the Supreme Court was "whether the agreement is to be construed as making performance by the union [which had been made a third-party defendant] of its promises a condition precedent to Benedict's promise to pay royalty to the trustees." *Id.* at 465. The Court held

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[2] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

that collective-bargaining agreements are not typical third-party-beneficiary contracts and rejected Benedict's assertion, noting that "[i]f Benedict and other coal operators having damage claims against the union for its breaches may curtail royalty payments, the burden will fall in the first instance upon the employees and their families across the country." *Id.* at 469.[3]

While *Lewis* is arguably distinguishable from the instant case in that it dealt with a proffered substantive defense to the suit rather than the procedural defense of arbitration, the case is recognized as establishing an exception to the general rule that defenses good against the promisee are good against donee beneficiaries such as the Funds. Calamari & Perillo, *supra,* at 624 n.26. See also *Todd* v. *Casemakers,* 425 F. Supp. 1375 (N.D. Ill. 1977); *Wishnick* v. *One Stop Food & Liquor Store,* 359 F. Supp. 239 (N.D. Ill. 1973). And while *Lewis* alone may not be dispositive of Schneider's and Prosser's cases, it does refute their argument that the trustees, as third-party beneficiaries, are subject to the same defenses as could be asserted against a suit by the union.

B.

Second, defendants argue that the well-established national policy favoring arbitration as a means of resolving labor disputes compels the conclusion that arbitration is required in disputes such as these. The *Steelworkers Trilogy, supra,* is cited

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[3] The Court also expressed its concern, in words that are apt in the present context, with "protecting the interests of beneficiaries of the welfare fund, many of whom may be retired, or may be dependents, *and therefore without any direct voice in the conduct of union affairs.*" *Id.* at 470 (1960) (emphasis added). It would be unjust and contrary to the national labor policy, the Court reasoned, to reduce a recovery in favor of beneficiaries of a fund by reason of some default on the part of the union. "[T]he fund is in no way an asset or property of the union." *Id.* at 465.

as favoring arbitration of all industrial labor disputes. The defendants, however, overlook certain limitations inherent in the Court's decisions in those cases. First, as Justice Douglas pointed out, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. at 582. The arbitral process is, moreover, part of the collective-bargaining process. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. at 570 (Brennan, J., concurring). The arbitration clause and the "no strike" clause are generally each *quid pro quo* for the other. *Id.* at 567. And, as we shall explain, other important policies, such as the enforcement of federal statutory rights, may in a particular case have to be balanced against the policy favoring arbitration.

We recognize that defendants' position has support in past decisions of the Seventh Circuit and of panels of this Court. This very type of dispute has been held subject to arbitration by the Seventh Circuit in *Central States* v. *Howard Martin, supra.* The facts in *Howard Martin* are essentially the same as in Schneider's case. The opinion divides such suits into "simple collection matters," in which arbitration is unnecessary, and all those others in which some issue of contract interpretation is raised in defense. The precise meaning of the phrase "simple collection matters" is unclear, but it seems to mean something like cases of clear liability. See *Health Care Employees* v. *Constant Care Community Health Center*, 669 F.2d 213, 215 (4th Cir. 1982) (adopting the *Howard Martin* dichotomy but refusing arbitration where no substantive contractual defense was raised). The *Howard Martin* court, sensitive no doubt to the objection that the trustees have no right to invoke arbitration, replied that

> [t]o trigger the arbitration process, the Funds need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interest, to file a grievance against Martin.

Central States, Southeast & Southwest Areas Pension Fund v. *Howard Martin, Inc., supra,* 625 F.2d at 173 (footnote omitted).

The defendants also aptly cite *Farmer* v. *Fisher,* 586 F.2d 1226 (8th Cir. 1978), in which three union-appointed trustees brought an action in a district court to secure the appointment of "an impartial umpire" under §302(c)(5)(B) of the LMRA, 29 U.S.C. §186(c)(5)(B), to break a deadlock between them and the three employer-appointed trustees. The deadlock was over whether the trust should sue the employer to collect certain allegedly delinquent contributions. The question of delinquency *vel non* depended on interpretation of the collective-bargaining agreement. The district court appointed the impartial umpire as requested, but this Court reversed. It held that questions of contract interpretation had to be resolved by the arbitration procedure set forth in the collective-bargaining agreement. The very trust agreement involved provided that "[n]o dispute or question arising under this Trust . . . shall be subject to the grievance or arbitration procedure provided for in any collective bargaining agreement." *Id.* at 1228. But the Court nevertheless held that arbitration was required, on the ground that the case did not involve trust "administration," as contemplated that the case did not involve trust "administration," as contemplated by the LMRA's deadlock provision, but rather an extraordinary, non-trust issue of contract interpretation. Foreshadowing the *Howard Martin* distinction, the Court said that "[t]he right of trustees as a body to sue for contributions under other circumstances, as, for example, where the right to contributions is undisputed, is not before us." *Id.* at 1229 n.4. The only effect of the decision, it was said, was to change the initial forum in which the trust's rights would be decided from a court to an arbitration proceeding. No substantive rights of trustees or beneficiaries would be affected.

Similarly Prosser emphasizes, and quite properly, this Court's decision in *Central States, Southeast & Southwest Areas Pension Fund* v. *CRST*, 641 F.2d 616 (8th Cir. 1981). There the Court affirmed the dismissal of a suit by trustees to compel inspection of employment and earnings records of all the employees of CRST. The trustees were entitled to see only the records of covered employees, the Court said, as that term is defined in the collective-bargaining agreement, and if a dispute arises as to who is covered, the grievance and arbitration procedure provided in that agreement should be used. The Funds have no right to invoke those procedures, but "it would appear that in the event a dispute should arise respecting coverage, the duty of fair representation would impel the Union to invoke the grievance machinery if the Funds were to request such action." *Id.* at 618.

Also part of this line of authority is *Layne-Western Co. Inc.* v. *Int'l Union of Operating Eng'rs*, 650 F.2d 155 (8th Cir. 1981), which holds, relying on *Howard Martin* and *Farmer* v. *Fisher, supra*, "that the issue of whether contributions are due to the funds for certain types of work performed under the collective bargaining agreements . . . presents a question of interpretation of the collective bargaining agreement and therefore an issue for the arbitrator." *Id.* at 158. *Layne-Western* is not so closely in point as *Howard Martin, Farmer* v. *Fisher*, and *CRST*. It was not an action by trustees against the employer to collect contributions claimed to be delinquent. It was a suit by the employer against the union to enjoin a strike called to protest the company's failure to make certain disputed payments. There was not even a potential divergence between the views and interests of the trustees and those of the union. It was clear that the union, which had gone to the length of striking over the issue, could be depended on to pursue arbitration vigorously, if that should turn out to be the indicated remedy. In addition, the Court stressed that once the arbitrator had determined what work was covered under the contract the trustees would have a right to "audit the appropriate payroll records of any Employer." *Id.* at 158 n.4.

There is no doubt that these cases support defendants' position. *Farmer* and *Layne-Western*, if not *CRST*, are closely in point and would normally govern our conclusion. On reflection, however, we believe that they were not correctly decided. *Stare decisis* is an important aspect of the judicial process, but sometimes it is more important to be correct than to be consistent. After carefully considering the implications of several recent cases, all of them decided after *Howard Martin*, and after analyzing the relationship between unions and §302(c)(5) funds, we are convinced that we should depart from the panel opinions described above.

C.

The national pension policy embodied in §302(c)(5), of the LMRA, 29 U.S.C. §186(c)(5), in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001 et seq., and in the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. 96-364, 94 Stat. 1295, 29 U.S.C.A. §§1132a et seq. (1976-81 Supp.), confers statutory rights on beneficiaries of funds like those that brought this case. Although these rights of course originate in the private contract between union and employer, Congress has chosen to give them considerably more protection than the traditional state-law action for breach of contract would afford. Recent Supreme Court cases illuminate the nature of this protection and underscore the important differences between unions and trust funds.

In *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), the Court emphasized that ERISA codified the trustee's obligations at common law:

> ERISA essentially codified the strict fiduciary standards that a §302(c)(5) trustee must meet. See 29 U.S.C. §1002(1) & (2) . . . Section 404(a)(1) of ERISA requires a trustee to "discharge his duties . . . solely in the interest of the participants and beneficiaries . . .." [citations omitted]. Sec-

> tion 406(b)(2) declares that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. §1106(b)(2).

Id. at 332-33. The incorporaton of common-law principles into the statute was further described in Justice Stewart's opinion for the Court:

> Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. Restatement (Second) of Trusts §170(1) (1957); 2 A. Scott, Law of Trusts §170 (1967). To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalty must be enforced with "uncompromising rigidity." *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (Cardozo, C.J.).

Id. at 329.

The question presented in *Amax* was whether employer-appointed trustees of a §302(c)(5) fund were "representatives" of the employer "for the purposes of collective bargaining or the adjustment of grievances" within the meaning of §8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(B). The union had struck in an attempt to get the employer to continue contributing to national trust funds for the benefit of employees. The company wanted to establish its own trust fund for the employees at one of its mines, and to name the management trustees of that fund. The national funds, on the other hand, were contributed to by many employers. Amax, as a member of the Bituminous Coal Operators Association, had had a voice in selecting the management trustees of the national funds, but if its contributions were to go to a separate, one-mine fund, it alone would select all the

management trustees of that fund. Amax claimed that the union's efforts were an unfair labor pratice under §8(b)(1)(B), on the theory that trustees were collective-bargaining representatives of management, and that the union was trying to coerce Amax in the selection of these representatives. The Court rejected this argument. It noted that "nothing in the language of §302(c)(5) reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him . . .." 453 U.S. at 330. It stressed the separateness of the fund and its trustees from both the union and the employer. And it referred approvingly to the following remarks by one of the two sponsors of §302(c)(5):

> Senator Ball stated that "all we seek to do by [§302(c)(5)] is to make sure that the employees whose labor builds this fund and are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled." 93 Cong. Rec. 4753 (1947) . . ..

Id. at 331.

We also find language in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), of some relevance. There, the Court referred to the MPPAA, which added a new Section 515 to ERISA, 29 U.S.C.A. §1145 (1976-81 Supp.), reading as follows:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Id. at 86 (footnote omitted). The Court referred to a passage from the legislative history of this new section:

> The provision which was eventually enacted as [§515] was added to S. 1076 by the Senate Committee on Labor and Human Resources. The Committee explained that the pro-

> vision was added because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions," and steps must be taken to "simplify delinquency collection." Senate Committee on Labor and Human Resources, S.1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 44 (Comm. Print, Apr. 1980) (1980 Senate Labor Committee Print) (emphasis added). During floor debate, Senator Williams and Representative Thompson explained the purpose and meaning of [§515] in the same language used in the Senate Labor Committee Print.

Id. at 87 (footnote omitted). The disapproving reference to what complicated defenses raised by employers have done to "simple collection actions" is striking in light of the *Howard Martin* court's use of the same phrase.[4]

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[4] The quoted Senate Committee print also states that "[r]ecourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly." Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 44 (Comm. Print 1980). In the House, moreover, Representative Thompson, Chairman of the Committee on Education and Labor and floor sponsor of the House companion bill, stated: "Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and *without regard to issues which might arise under labor-management relations law - other than 29 U.S.C. 186*," the provision making certain employer payments to labor organizations illegal. 126 Cong. Rec. 23039 (1980) (emphasis added).

Kaiser had to do with the employer's right to assert, in a court action brought by trustees, the defense of illegality. We quote the legislative history of MPPAA here simply to demonstrate Congress's recently expressed resolve to facilitate efforts by trustees to enforce employers' obligations. Issues of arbitrability can be quite complex, and allowing them to be injected into trustees' collection suits can frustrate this legislative purpose.

The Court recently underscored again the importance of the funds' independence from the union, and the distinctions between the union's interests and those of the beneficiaries. In *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 102 S. Ct. 1226 (1982), the following description appears of §302(c)(5):

> The section was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders. Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as "war chests" to support union programs or political factions, or might become vehicles through which "racketeers" accepted bribes or extorted money from employers.

Id. at 1232. The Court also remarked, *id.* at 1233, that "potential beneficiaries [of §302(c)(5) funds] are [sometimes] not members of the bargaining unit" that the union is obligated to represent. "[F]ormer members and their families may suffer from discrimination . . . because the union need not 'affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in behalf of those whom it does represent.' *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20." *Id.* at 1233-34 (footnote omitted).[5]

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[5] The following passage from *Allied Chemical, supra*, 404 U.S. at 181 n.20, quoted with approval in *Robinson, supra*, 102 S. Ct. at 1234 n.14, is also significant:

> Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col. L. Rev. 909, 916-920 (1970). The retiree, moreover, would have a federal remedy under §301 of the Labor

The Supreme Court has, moreover, recently reemphasized that certain statutory labor rights, for example rights under the Fair Labor Standards Act, are not subject to waiver under a grievance-arbitration clause. *Barrentine* v. *Arkansas Best Freight System*, 450 U.S. 728 (1981). Although *Barrentine* involved a different right from those under consideration here, it at least shows that the presumption in favor of arbitration is not, of itself, sufficient to place statutory rights or obligations, such as those imposed on trustees and employers by ERISA and MPPAA, under the arbitral process. *Cf. Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII cause of action not subject to arbitration).

The notion of nondelegability and non-waiver of the trustees' responsibilities has also received pointed support in the Third Circuit's recent decision in *Rosen* v. *Hotel & Restaurant Employees*, 637 F.2d 592 (3d Cir. 1981). *Rosen* is particularly important because of the difficult, if not untenable, position in which it would placed the trustees if *Howard Martin* were followed. In that case a retired employee sued his union and the pension fund to recover his pension under the collective bargaining agreement. The fund asserted that Rosen did not have the required years of credited service because his employer had failed to make contributions for some years of his employment. The Court of Appeals held Rosen entitled to a pension because the trustees had a fiduciary obligation to notify him, as a future beneficiary of the fund, that his pension was in jeopardy by reason of his employer's failure to contribute. The court

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Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith* v. *Evening News Assn.*, 371 U.S. 195, 200-201 (1962); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 470 (1960).

This reasoning would be rendered nugatory by a rule of law that makes trustees' access to the courts subject to an effective veto by the union.

found this duty in the trustees' common-law obligations, as codified in ERISA.[6] Crucial to the present discussion was this statement by the Third Circuit:

> In addition, defendants' status as fiduciaries requires them to take action against employers who fail to contribute to the fund as required by the plan. This obligation could require the trustees to commence suit, or to picket the non-contributing employer; but some action must be taken to safeguard beneficiaries' credited service.

Id. at 600. It seems that the trustees of Taft-Hartley pension funds are in danger of being whipsawed by the decisions in *Rosen* and *Howard Martin*. In the Third Circuit they are under a probable duty to sue for delinquent contributions, and in the Seventh Circuit they are prevented from doing so in many cases.

D.

We do not claim that these recent Supreme Court opinions require us to depart from our prior panel opinions, or that *Rosen* is logically irreconcilable with them. The cases we have summarized all arose in different contexts, and none of them focused on the precise question presented here. But they are suggestive enough to raise serious questions about the rationale of *Farmer*, *CRST*, and *Layne-Western*. Basically, those cases say fund trustees can easily get the union to pursue arbitration, or sue it for not doing so. We cannot agree that unions can be expected to act so readily in the funds' interests.

The union's and the funds' interests will not always be in harmony. The union's primary interest, and properly so, is in keeping as many of its members as possible working, with the best possible wages and working conditions. Arbitration costs

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[6] In so holding, the Third Circuit relied on our decision in *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976).

money, and the union may have better or more pressing uses for its limited funds.[7] It may not wish to bear its half of the cost of an arbitration proceeding. In addition, the pressing of a claim for, say, an audit of the employer's books may irritate the employer in a way incompatible with the union's own legitimate goals. A pension-fund claim can result in a liability of many thousands of dollars for the employer. The union may prefer for that money to be available to pay the wages of its members who are now working, rather than to support former employees, or the families of deceased former employees. Worries about the present are for most union members (and for most other people, too) more pressing than worries about the future. The union may be inclined to trade off a potential pension-fund claim against some other bone of contention in its relations with the employer. And such a decision may be completely legitimate. In order to succeed in a suit against a union for an alleged breach of the duty of fair representation, the trustees would have to show something more than a mere refusal to take an arguably meritorious pension or welfare claim to arbitration. "[A] union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration." *Vaca* v. *Sipes,* 386 U.S. 171, 192 (1967). As the Supreme Court has held, moreover, *Allied Chem. & Alkali Workers* v. *Pittsburgh Plate Glass Co., supra,* the union has no affirmative duty to represent those who are no longer members. It may not even (as in Schneider's case) represent the employer's current employees. Defendants suggest that the trustees, in ad-

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[7] In Prosser's case the union on one previous occasion refused to arbitrate a trust-fund claim arising under the 1976 collective-bargaining agreement, even though the employer requested arbitration. We do not know why. It its motion to dismiss in the District Court, Prosser's claimed, *inter alia,* that this union conduct should estop the trustees to inspect records for the period in question.

dition to asking the union to invoke arbitration, could also seek administrative or criminal remedies, but those avenues are even more remote and uncertain than the second-hand access to arbitration that is put forward as the funds' main recourse.

The union and a pension fund are both fiduciaries. But they represent groups and interests that only partly coincide. We conclude that the national pension policy described above, and the rights of plan beneficiaries, can be vindicated as Congress seems to have intended only if trustees are given a direct right of access to the courts.

III.

Certainly it is true that arbitration, pension funds, and health and welfare funds, are all matters of contract. They either exist or not as the parties have agreed in the collective-bargaining contract and related documents. If the agreements in the cases before us provided in express words that trustees' claims could not come to court before questions of contract interpretation had been settled by arbitration, this would be quite a different case. But they do not. In fact, Article III, §5 of both trust indentures give the trustees the right to "examine pertinent records of each employer . . . whenever such examination is deemed necessary or advisable by the Trustee in connection with the proper administration of the trust," and Article III, §4, reads as follows:

> [the] Trustees shall take such steps, including *institution and prosecution of*, and intervention in, any *legal proceedings* that the Trustees in their discretion deem in the best interest of the fund to effectuate the collection or preservation of contributions or other amounts which *may be* owed to the trust fund, without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purposes." (emphasis supplied).[4]

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[4] The arbitration clause in the collective-bargaining agreements applies "should difference arise between the Company *and the Union* or any employee of the Company as to the meaning or application of the provisions of the Agreement." (Emphasis ours.)

Whatever else may be said about these provisions, one thing is clear: they do not unambiguously subject the trustees' rights and obligations to the union's privilege of invoking the arbitration process under the collective-bargaining agreement. The union may choose to assist the funds by invoking this process. Our holding in no way obstructs that alternative avenue of redress. Nor need we decide in the cases before us how to accommodate the judicial and arbitral processes and their results if both are invoked with respect to the same pension or welfare claim.[9] We hold only that the trustees may come into court without first getting the union to invoke the machinery of arbitration. To the extent that *Farmer*, *Layne-Western*, and *CRST* are inconsistent with this holding, they are overruled.

We leave all other questions, including possible defenses of waiver, estoppel, laches, and limitations, to the District Court for exploration on remand. The judgments are reversed, and the causes remanded for further proceedings consistent with this opinion.

It is so ordered.

HENLEY, Senior Circuit Judge, with whom JOHN R. GIBSON, Circuit Judge, joins, dissenting.

Today the court makes bad law.[1] It unnecessarily overrules three prior decisions of this court, rejects the reasoning of the Seventh Circuit in *Martin* and erodes the pro-

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[9] There may be some danger that courts will interpret agreements in a way different from arbitrators. We note, however, that courts are permitted to consider the reasoning of arbitration panels that have previously interpreted provisions similar to the ones *sub judice*.

[1] No effort is maded to qualify the decision as falling either within or beyond any of the "bad law" categories mentioned by Justice Rehnquist in his dissent in *Larkin* v. *Grendel's Den, Inc.*, 51 U.S.L.W. 4025, 4028 (U.S. Dec. 13, 1982).

nouncements of the Supreme Court in the *Steelworkers Trilogy*. Its decision may be perceived as doing disservice to the national policies of maintaining industrial peace, avoiding delay and deferring to the expertise of persons acquainted with industry standards and the law of the shop.

In prior decisions, this court has concluded that trust fund disputes requiring interpretation of collective-bargaining agreements initially should be submitted to arbitration.[2] *Layne-Western Co.* v. *International Union of Operating Engineers*, 650 F.2d 155 (8th Cir. 1981); *Farmer* v. *Fisher*, 586 F.2d 1226 (8th Cir. 1978); *see Central States, Southeast & Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981); *see also Health Care Employees* v. *Constant Care Community Health Center, Inc.*, 669 F.2d 213 (4th Cir. 1982); *Central States, Southeast & Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980); *International Brotherhood of Electrical Workers* v. *Dave's Electric Service, Inc.*, 382 F. Supp. 427, 433 (M.D. Fla. 1974), *remanded on other grounds*, 545 F.2d 987 (5th Cir. 1977). The court rejects the reasoning of these cases, holding instead that benefit fund trustees may initiate suit in federal court without resort to arbitration, even where the dispute in question involves issues of contract interpretation. I cannot agree with this departure from precedent.

We are told that in the *Prosser* case the basic question may be the right of the trustees to an audit of company accounts to determine whether appropriate payments have been made, but

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[2] In contrast, cases involving matters of trust fund administration, such as collection actions, need not be submitted to arbitration. *E.g.*, *Layne-Western Co.* v. *Int'l Union of Operating Eng'rs*, 650 F.2d 155, 158 (8th Cir. 1981). Since such disputes do not require the interpretation of a collective-bargaining agreement, the policies justifying deferral to arbitration are largely inapplicable.

that Schneider has submitted to audit and that the basic question raised relates to coverage. However, the reach of the court's opinion is not narrowed to audit issues, and it seems clear that in essence the underlying dispute in the cases at bar concerns the coverage of certain employees, for purposes of contribution, under the collective-bargaining agreements.[3] This issue, to be properly answered, requires resort to and interpretation of those contracts, and, therefore, under the terms of the agreements must be submitted to arbitration.[4]

In the *Steelworkers Trilogy*[5], the Supreme Court articulated the strong federal policy favoring arbitrability of labor disputes. This policy, based upon the national goal of industrial peace, *see, e.g., Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 377-79 (1974), provides an efficient and expeditious means of dispute resolution in the labor context, utilizing impartial arbitrators possessing specialized knowledge with respect to the industry and issues involved. In my view, this presumption of arbitrability is applicable to the basic dispute from which these appeals stem.

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[3] Both suits were found by the district court to involve questions of coverage of certain employees.

[4] The collective-bargaining agreements at issue provide the definition of the term "covered employees"; indeed, this term is not defined in any of the ancillary documents. The agreements also provide a grievance-arbitration mechanism "should differences arise between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of the Agreement." This provision is sufficiently broad to encompass the underlying dispute — employee coverage — in the instant cases. *See Steelworkers Trilogy, infra* note 5 (in light of national policy favoring arbitration, general arbitration provisions are to be broadly construed).

[5] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The court, in reaching a contrary result, relies in large part upon recent Supreme Court decisions in the area of national pension policy. Although these opinions do discuss differences between unions and trust funds in this context, the majority concedes, *ante*, at 16, that the decisions do not compel departure from the prior panel opinions of this court. Indeed, there is nothing in the cited decisions, or the references to legislative history there included, that persuades me to abandon the traditional policy favoring the arbitration of disputes concerning the interpretation of collective-bargaining agreements. Nor do I believe that continued adherence to this policy in present context conflicts to any significant degree with the independence or obligations of the benefit fund trustees. The independence of the trustees is adequately protected not only by case law but also by the mandates of the LMRA and ERISA; further, if after the trustees have requested arbitration the union does not pursue that remedy, or fails to act in the best interest of the fund beneficiaries, the trustees are free to seek redress in the courts.

It is to be remembered that the unions have a duty of fair representation which impels them to invoke the grievance machinery in appropriate circumstances, *Central States, Southeast & Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d at 618, and this court should not presume a violation of that duty.[6] Rather, it should reject hypothetical and unlikely threats to the independence of the trustees and require the parties first to resort to arbitration, where the law of the shop and the terms of the collective-bargaining agreements may best be interpreted. One need not be clairvoyant to foresee that the spirit of negotiation and compromise that forms the basis for

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[6] It is, of course, somewhat troubling that the union was apparently decertified as the employees' representative in No. 80-2117. However, the union still exists, as does its duty of fair representation, and as noted, the trustees would be free to seek judicial redress should resort to arbitration prove unsuccessful.

such agreements might be seriously compromised if the parties become aware that the terms of the agreements might be safely ignored or interpreted initially other than through than through the arbitration machinery.

Absent some reasoning more compelling than that which the court has been able to muster, I am unable to justify, much less to join in, its decision.[7] Accordingly, I dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[7] Since the instant appeals were submitted, the Sixth Circuit has filed its opinion in *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, No. 81-1757 (6th Cir. Jan. 20, 1983). To the extent that the considerations in *Central Transport* parallel those raised here, the views expressed in this dissent appear to be consistent with the reasoning employed by the Sixth Circuit.

APPENDIX D

PUBLIC MOVERS OF GREATER ST. LOUIS
AND ST. LOUIS COUNTY

March 1, 1976 - February 28, 1979

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AGREEMENT

This AGREEMENT, dated March 1, 1976, by and between the _____ or its successors, located in St. Louis, Missouri, hereinafter called the "Company," and Local Union No. 610, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or its successors hereinafter called the "Union." It is further agreed that "Company" means the aforesaid Company and any other Company engaged in public moving in the Metropolitan St. Louis Area, as that area is defined by the Interstate Commerce Commission, which is owned or controlled, directly or indirectly, by the same interests that own or control the Company.

During the term of this Agreement, it is agreed that neither party shall be obligated to bargain individually or collectively with respect to any matter or subject covered by this Agreement, or with respect to any matter the subject of negotiations preceding this Agreement, excepting in the matter of grievances or as required by law or in the event any part of this contract be determined invalid or illegal.

This contract shall constitute the whole agreement between the parties as to rates of pay, wages, hours of work, conditions of employment and such other matters as herein stated.

ARTICLE I. UNION RECOGNITION

Section 1.1 The Company agrees to recognize, and does hereby recognize, the Union, and its properly authorized and identified agents and representatives as the exclusive bargaining agency for all of the employees of the Company as herein defined.

Section 1.2 The term "Employee" in the collective bargaining unit covered by this contract shall include only drivers, warehousemen, packers, and helpers engaged in storage, packing, and moving and shall exclude all other employees engaged in any other classification of work.

Section 1.3 The Company agrees that it will make no other contracts or Agreements with the employees falling within the aforedescribed collective bargaining unit, with respect to wages, hours or working conditions, whether such other agreement or contract be consistent or inconsistent with the terms hereof, as long as this contract shall be in effect.

Section 1.4 The Company agrees that they will not sponsor or promote, financially or otherwise, any group or other labor organization expressly established for the purpose of undermining the Union, nor will the Company interfere with, restrain, coerce, or discriminate against any of the employees covered by this contract in connection with their membership in the Union.

Section 1.5 For the purpose of preserving work and job opportunities for the employees covered by this Agreement, the employer shall not circumvent this contract and shall use its employees, members of the bargaining unit.

(a) For all Local Moving (residential and commercial)

(b) For all packing and unpacking, crating and uncrating, and delivery and pickup of all packing materials and equipment.

(c) For all warehousemen's work

(d) To work as helpers for all long distance work, loading and unloading of all long distance trucks, when the company has knowledge of the work, and when such work is to be performed in the Greater St. Louis Area. Drivers of two separate vehicles shall not be permitted to assist each other when the employer has knowledge of the work as origin or destination agent. A registered two man operation shall be permitted to assist each other on a single job.

ARTICLE II. UNION SECURITY

Section 2.1 (A) The Company recognizes and acknowledges that the Local Union is the exclusive representative of all employees in the classification of work covered by this agreement for the purposes of collective bargaining.

(B) All present employees who are members of the Local Union on the date of execution of this subsection shall remain members of the Local Union in good standing as a condition of employment. All present employees who are not members of the Local Union and all employees who are hired hereafter shall become and remain members in good standing of the Local Union as a condition of employment on and after the 31st day following the beginning of their employment or on and after the 31st day following the date of execution of this agreement or the effective date upon which a local bargaining unit becomes party to this Master Agreement, whichever is the later.

The parties recognize the fact to be that the Union's knowledge and experience within the industry here involved, together with the sources of competent manpower available to it, can be of assistance to the company in recruiting needed regular employees considered for hire on a permanent basis. It is therefore agreed that the company shall notify the Union when ever regular employees are to be hired and shall afford the

Union an opportunity to recommend job applicants. Selection of any regular employee shall be made solely by the Company after completion of its customary personnel procedures. The parties also recognize the fact that the Union's employment office may be of like assistance in supplying extra men to meet the Company's need for daily additional temporary manpower. It is therefore further agreed that the Company shall notify the Union's employment office whenever such daily additional temporary men are needed, and afford the Union a reasonable opportunity to recommend extra men to qualify and fill such need for temporary help. Selection shall be made soley by the Company.

(D) No provision of this Article shall apply in any State to the extent that it may be prohibited by State Law. If under applicable State Law, additional requirements must be met before any such provision may become effective, such additional requirements shall first be met.

(E) In those instances where subsection (B) hereof may not be validly applied, the Company agrees to recommend to all employees that they become members of the Local Union and maintain such membership during the life of this Agreement, to refer new employees to the Local Union representative, and to recommend to delinquent members that they pay their dues they are receiving the benefits of this contract.

(F) Nothing contained in this section shall be construed so as to require the Company to violate any applicable law.

Section 2.2 The Company agrees to deduct from the pay of all employees covered by this agreement dues, initiation fees of the local union and agrees to remit to said local union all such deductions. Where laws require voluntary written authorization by the employee, the same is to be furnished in the form required. No deduction shall be made which is prohibited by applicable law.

Section 2.3 The Union shall indemnify and save the Company harmless against any and all claims, demands, suits or other forms of liability that shall arise out of or by reason of action taken or not taken by the Company in reliance upon written information furnished to the Company by the Union, or for the purpose of complying with the provisions of this Article.

ARTICLE III. LEAVE OF ABSENCE

Section 3.1 **Time Off for Union Activities:** The Company agrees to grant the necessary and reasonable time off, without discrimination or loss of seniority rights and without pay, to one of its employees designated by the Union to attend a labor convention or serve in any capacity on other official union business, provided seven (7) calendar days written notice is given to the Company by the Union, prior to the beginning date of requested leave. The Union agrees that in making its request for the time off for Union activities, due consideration shall be given to the number of men affected in order that there shall be no disruption of the Company's operations due to lack of available employees.

Section 3.2 **Leave of Absence:** Any employee desiring leave of absence from his employment shall secure written permission from both the Union and the Company upon his making written application therefor, stating the reason for the leave if requested. An initial leave of absence shall be for thirty (30) days and may be extended for like periods, not to exceed ninety (90) days. Permission for same must be secured from both the Union and the Company. During the period of absence, the employee shall not engage in gainful employment within the industry. Failure to comply with this provision or misrepresentation of the reason for the leave shall result in the complete loss of seniority rights for the employees involved. Inability to work because of proven sickness or injury shall not result in the loss of seniority rights.

ARTICLE IV. SENIORITY

Section 4.1. The principle of Company-wide seniority is hereby recognized. In the event of a layoff affecting regular employees who have been employed for a period of sixty (60) days or more, the following factors shall govern:

(A Length of continuous service.

(B) Ability to do the available work competently.

Section 4.2. **Probationary Employment.** An employee, new to the company, who otherwise qualifies, shall be considered on a trial basis for a period of no longer than sixty (60) calendar days during which he may be separated from his employment without prejudice to, or recourse upon the Company. After completion of such probationary employment, such new employee shall be considered as a regular employee and his seniority shall date from the first date of his employment, or from the first date of his rehire. However, a new regular employee shall be eligible for all fringe benefits, as provided in this agreement, after one hundred twenty (120) days following the first date of his employment unless he had been immediately previously employed and covered as a regular in the industry in which event his eligibility for fringe benefits shall begin the first date of his employment or re-employment. An employee shall qualify for vacation benefits as outlined in Article XV. However, new employees shall qualify for holidays after sixty (60) days of employment as outlined in Article XI, Section 8.

Section 4.3. An employee who is laid off in accordance with the standards of Section 4.1 above shall be recalled according to the same standards, provided that eligibility for such recall shall not extend more than twenty-four (24) calendar months subsequent to the date of layoff. An employee who is laid off shall be recalled by verified notice. The steward shall be made aware of the verified recall.

Section 4.4. A list or roster of regular employees arranged in the order of their dates of employment shall be displayed on the Employer's Bulletin Board at all times.

Section 4.5. It has been mutually recognized that the Seniority Principle set forth in Article IV of the contract shall not apply to:

(A) The choice of equipment.

(B) Preference as to type or classification of work.

(C) Preference of work assignments.

(D) Preference of starting times.

It is further recognized that it cannot be applied for intervals of less than a day's time after the day has started. That is, to illustrate: Employees who are sent out at 8:00 A.M. and who return at different times in the day, cannot use seniority to displace, for the remainder of the day, junior employees whose assignments happen to last longer.

However, side by side with this acknowledgement goes the duty of management to give to senior employees the greater opportunities of employment. In other words, the older men in point of service are to be given those assignments which, according to the best judgment of management are likely to be the longer assignments. In this connection, management can only be expected to make its best estimate as to the probable length of jobs, since all parties realize it is very difficult to forecast with accuracy the duration of the various jobs.

Section 4.6. Seniority shall be deemed broken and all privileges under this Agreement shall cease, when an employee

(1) Resigns.

(2) Is discharged for just cause.

(3) Fails to report for work and notify his company of his inability to work without reasonable explanation thereof being presented within twenty-four (24) hours after his scheduled starting time.

(4) Has been on lay-off for more than twenty-four (24) months.

(5) Illegal use of drugs.

ARTICLE V STEWARDS

The right of the employees to select a steward or alternate steward is hereby recognized. The steward or alternate steward, when authorized or identified in writing by the Union to the Company shall be the recognized representative of the Company's employees covered by this contract and shall have the right to discuss grievances with the Company and shall see to the application and enforcement of the provisions of this contract in the interests of the Company, the Company's employees and the Union. It is understood that the steward or alternate steward shall not be authorized to call a work stoppage or in any way to interfere with scheduled work.

ARTICLE VI GRIEVANCE PROCEDURE

Should differences arise between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of this agreement, such differences shall be settled in the following manner:

Section 6.1. The aggrieved employee or employees shall first take the matter up with the shop steward who in turn will take the grievance up with the forman in charge of the department within three (3) working days after knowledge of the alleged violation. The employees shall have the right to have the shop steward present on any grievance.

Section 6.2. If no satisfactory adjustment is agreed upon within one (1) working day, the matter shall be referred in writing within five (5) working days by the steward and/or union to the general manager of the company involved, or some other executive officer of the Company with authority to act, who shall review the alleged grievance and offer a decision within five (5) working days after receipt of the same.

Section 6.3. If no agreement has been reached pursuant to the procedure specified in Section 6.1 and 6.2, the Union reserves the right to request arbitration of the dispute. If arbitration is requested by the Union within thirty (30) days following the decision of the General Manager, the Company and the Union agree to submit the grievance to an arbitration board as provided for in this Agreement. However, if arbitration is not requested by the Union, the Union reserves the right to use its economic power in support of its demands. Economic power must be taken within fifteen (15) days following the decision of the General Manager. It is agreed by both parties that any action taken by the Union shall not constitute a violation of this contract, notwithstanding any provisions of this contract to the contrary.

Section 6.4. If the grievance is submitted to arbitration, the Company and the Union agree to accept, as final and binding on all parties, the decision of the majority of an arbitration board consisting on one (1) member selected by the Company and one (1) member selected by the Union and the third selected by the two arbitrators nominated above. It shall be incumbent upon both parties to nominate the third arbitrator within seven (7) days after such notice is given. Upon the failure of the two arbitrators nominated as above to agree upon the third arbitrator, both parties agree to ask the U.S. Mediation and Conciliation Service to nominate five (5) persons for such third arbitrator from whom the parties will select one by each side alternately striking from the list, one name, commencing with the party seeking arbitration and the last name remaining on such

list will be deemed chosen as the third arbitrator. The expense of the arbitrator selected by the Company shall be borne by the Company. The expense of the arbitrator selected by the Union shall be borne by the Union. The expense of the third arbitrator selected or appointed shall be borne equally by the Company and the Union.

ARTICLE VII. MANAGEMENT

Section 7.1. It shall be the right of the Company to manage and direct its business and subject only to the terms and provisions of this agreement, the Company shall have the right to hire, discipline, discharge, promote, transfer, lay-off, and assign work to its employees, and in general exercise the usual rights of management excepting only as they are limited and restricted by this agreement.

ARTICLE VIII. NO STRIKE AND NO LOCKOUT

Except as provided for in Article VI, during the period of time that this Agreement is in force and effect, there shall be neither strike by the Union nor lockout by the Company.

ARTICLE IX. STRUCK GOODS AND PICKET LINE

Section 9.1. Recognizing that many individual employees covered by this contract may have personal convictions against aiding the adversary of other workers, and recognizing the propriety of individual determination by an individual workman as to whether he shall perform work, labor or service which he deems contrary to his best interests, the parties recognize and agree that:

It shall not be a violation of this agreement and it shall not be a cause for discharge or disciplinary action if any employee solely on his own initiative refuses to perform any service which, but for the existence of a controversy between a labor union and any other person (whether party to this agreement or not), would be performed by the employees of such person.

Likewise, it shall not be a violation of this agreement and it shall not be a cause for discharge or disciplinary action if any employee solely on his own initiative refuses to handle any goods or equipment transported, inter-changed, handled or used by any carrier or other person, whether a party to this agreement or not, at any of whose terminals or places of business there is a controversy between such carrier, or person, or its employees on the one hand and a labor union on the other hand; and such rights may be exercised where such goods or equipment are being transported, handled or used by the originating or interchanging or succeeding carriers or person, whether parties to this agreement or not.

The Company agrees that it will not cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other company or cease doing business with any other person, or fail in any obligation imposed by the Motor Carriers Act or other applicable law, as a result of individual employees exercising their rights under this agreement or under law, but the Company shall, notwithstanding any other provision in this Agreement, when necessary, handle, use, transport or otherwise deal in such products and continue doing such business by use of other employees, (including management representatives, other carriers, or by any other method it deems appropriate or proper).

Section 9.2. It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action, in the event any employee refuses to go through or work behind any picket line, including the picket of the Union party to this Agreement and including picket lines at the Company's place or places of business.

ARTICLE X. DISCHARGE OR SUSPENSION

Section 10.1. It is understood and agreed that all employees shall do their best to further the interest of the Company by being sober, courteous, and respectful.

Section 10.2. The Company shall not discharge or suspend any employee without just cause and shall have given at least one warning notice of a complaint of a related nature against such employee in writing to the employee and steward and shall send a copy of the same to the Union; however, such warning shall not remain in effect for a period of more than nine (9) months from the date of said warning notice except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drunkenness, the use of intoxicating liquors while on duty, willful abuse of property, gross insubordination, refusal to accept assignment, illegal use of drugs (G.B.W).

Section 10.3. It is understood, however, that any employee discharged or disciplined under this article shall have the right to appeal such discharge or discipline under the Grievance Procedure as established herein, providing such appeal is made to the Company within five (5) working days of the date of discharge or discipline.

ARTICLE XI. OVERTIME AND PAY PRACTICES

Section 11.1 **Computing Time Worked:** The Company shall furnish time clocks or some other method of indicating time in and time out as is feasible or appropriate under the circumstances. In figuring the time worked by an employee, the Company shall credit him with time worked in the service of, and at the direction of, the Company. In figuring the time worked by an employee, the Company shall credit him with time worked from the moment that he leaves thew garage until he returns to the garage, except when he is expected or instructed to report for work at a particular hour, in which event he shall be credited with time worked from the moment he so reports; provided, however, that such employee in this unit covered by this agreement shall be compensated at a rate of pay stated herein and applicable to the work actually being performed at the time by such employee. This rate shall be paid to him for all

hours in which he is so working. In the event of commercial moving, the Company shall credit him with time worked from the time he is instructed to report to the work place, or begin to work, to the time he completes such work. It is mutually agreed between the parties to this contract that men assigned to a move shall be provided company transportation, by the company, to their personal transportation if left at point of origin of move, or at company premises, or, if asked to report to a specific location they shall be reimbursed for out-of-pocket expense on parking.

Section 11.2. **Call-In Time:** Whenever employees are requested or expected to report for work at a particular time and there is not work available for them, they shall be guaranteed a minimum of five (5) hours' pay at straight time rates whether they work or not, provided, that the employees will not be so compensated if he is not ready to, willing to, and available for work on the Company's premises or at the work place during the time for which he is being compensated. All extra employees shall be paid from the time requested to report for work, or from the time employee actually reports. When performing work at a premium rate of pay, in the event less than five (5) hours are worked, an employee shall be paid for the portion of said five (5) hour period actually worked at the premium rate of pay and for the remaining portion of said five (5) hours at his straight-time rate. When performing commercial work at the premium rate of pay, an employee shall be guaranteed five (5) hours at the premium rate in effect whether he works or not.

Section 11.3. **Pay periods:** All regular employees shall be paid weekly on Friday. All extra employees shall be paid upon completion of their tour of duty. All employees shall, with each pay check, receive an itemized statement of earnings and deductions.

Section 11.4. **Work Hours:** The regular work day shall begin at 8:00 A. M. and end at 4:30 P. M. Employees shall be allowed one-half hour for lunch. However, by mutual agreement be-

tween a Company and its employees the lunch period may be one hour, in which case the regular work day shall begin at 8:00 A. M. and end at 5:00 P. M.

However, the foregoing work hours may, from time to time, but not during a work week, be changed by any Company, providing: (a) the Company notifies the employee of the change on the preceding workday; (b) the starting time is not earlier than 7:00 A. M., not later than 8:30 A. M., and the end of an eight hour shift is not later than 5:00 P. M. and (c) the employee is paid at one and one-half (1-1/2) times his regular rate for hours in excess of eight (8) on such day. The foregoing starting time, shall not preclude the direction of any employee to start work at any time during the day when he is directed to report for work to start a job at a customer's location away from his employer's place of business.

Section 11.5 **Definitions:** Where the term "Local" is used herein, it shall refer to work done in the City of St. Louis, Missouri, or within a radius of 50 miles of the corporate limits of the City of St. Louis, Missouri. All other work shall, for the purposes of this agreement, be considered as "Long Distance Moving."

"Commercial" work shall mean all work performed for a business establishment, and involving the moving of office equipment, fixtures, records, and general office furniture, within the area termed as "Local."

Section 11.6 **Local Moving Rates of Pay:**

(A) Straight-time the local rate shall be paid for the first eight (8) hours worked -

(1) On local residential or commercial work performed between 8:00 A. M. and 4:30 P. M.

(2) On loading and unloading long distance trucks between 8:00 A. M. and 4:30 P. M. when the employee does not accompany the truck.

(B) Time and one-half the local rate shall be paid:

(1) For all work performed in excess of eight (8) hours in a regular workday.

(2) For all ocal residential or commercial work performed before 8:00 A. M. or after 4:30 P. M.

(3) For all work performed locally before 8:00 A.M. or after 4:30 P.M. or on Saturdays, in connection with the packing, or unpacking, loading or unloading of long distance vehicles engaged in long distance moving when the employee does not accompany the truck.

(4) For commercial or residential work performed on Saturdays.

(C) Double the local rate shall be paid:

For all work performed on Sundays or Holidays, loading or unloading, packing or unpacking at customer's location or company warehouse of long-distance shipments, except as provided for in subsections (B) (3) above.

(Note: Wherever the starting and ending times, 8:00 A.M. and 4:30 P.M. appears above in this Section, if the work hours have been changed for any employee pursuant to Section 11.4 above, the revised starting and ending times shall be considered substituted for such employee on that day.)

(D) In the event that a commercial moving job is started on a week day before 8:00 A.M. or after 4:30 P.M., or on a Saturday, Sunday, or a holiday, the Company will notify the Union and will indicate the time, the number of employees involved and the place.

Section 11.7 **Long Distance Moving**

(A) Straight-time the long distance rate plus a daily travel allowance of eighteen dollars and fifty cents ($18.50) shall be paid to all employees who have been away from their home terminal for a period of twelve (12) hours or more in any twenty-four (24) hour period. A daily travel allowance of Six ($6.00) Dollars shall be paid to all employees who leave and return to their home terminal and have not been away twelve (12) hours in any twenty-four (24) hour period.

(1) While engaged in long distance driving;

(2) While riding as a helper on a long distance moving;

(3) While engaged in loading or unloading, packing or unpacking, at point or origin, or at point of destination, provided the employee accompanies the truck.

(B) Men working on trucks equipped with sleeper cabs shall not be paid for time while sleeping in such cabs.

(C) Long distance straight time shall be paid at the rate of ten (10) hours for a twenty-four (24) hour period while trucks are laid up for repairs, or waiting for return loads, while away from the City of St. Louis, Missouri.

Section 11.8. **Holidays:** A regular employee shall receive eight (8) hours pay at the hourly rate for his classification for the following holidays not worked:

New Years Day	Labor Day
Memorial Day	Veterans Day
Independence Day	Thanksgiving Day
Christmas Eve	Christmas Day

Two additional holidays shall be granted to employees in addition to the above listed holidays. Said holiday shall be taken any time during the year, mutually agreed to by employer and employee, provided a two week notice is given by employee. The Employer will not refuse to give the day requested unless proof is shown that men needed to work makes refusal to mutually agree necessary, providing:

(A) Such employee has been employed sixty (60) days or more prior to said Holiday by the Company except as provided for in Article IV - Section 2.

(B) Such employee shall have worked for the Company on his last scheduled workday before and his first scheduled workday after said Holiday. No employee shall forfeit his holiday pay if he has been available for scheduled work but was unable to do so because of accident or illness as proven by competent medical testimony; funeral leave; or because or such absence which has been approved by the Company for an urgent, necessary and compelling personal reason, prior to the scheduled starting time of the day involved.

(C) Such employee, if he is on layoff status at the time the given Holiday occurs, he has worked for his employer within two weeks before or within two weeks after said Holiday.

Section 11.9. **No Ovetime on Overtime:** No employee shall be paid overtime twice for the same hours, nor shall overtime be computed upon any rate which in itself includes an overtime premium.

ARTICLE XII. RATES OF PAY

Section 12.1. The straight time hourly rates of pay for employees shall be as follows:

LOCAL WORK	Effective 3/1/76	Effective 3/1/77	Effective 9/1/77	Effective 3/1/78	Effective 9/1/78
Driver	$5.75	$5.95	$6.10	$6.30	$6.45
Warehousemen	$5.75	$5.95	$6.10	$6.30	$6.45
Packer	$5.75	$5.95	$6.10	$6.30	$6.45
Helper	$5.65	$5.80	$5.90	$6.05	$6.15

LONG DISTANCE WORK	Effective 3/1/76	Effective 3/1/77	Effective 9/1/77	Effective 3/1/78	Effective 9/1/78
Driver	$5.75	$5.95	$6.10	$6.30	$6.45
Helper	$5.65	$5.80	$5.90	$6.05	$6.15

Travel allowance shall be paid in accordance with Article II, Section 7.

Section 12.2. A new employee without previous experience in the Moving Industry in St. Louis may be hired at the rate of 80¢ per hour less than the scale for the classification of work for which hired, provided that his hourly rate is adjusted automatically 10¢ an hour upon the completion of every 30 calendar days of employment until the classification rate of Section 12.1 is attained. An employee with work experience when referred by the Union, shall be paid at the rate stated for his classification.

Casual, temporary, or part-time employees, exclusive of employees who regularly report to the union employment office, may be hired at the rate of $1.50 per hour less than the helpers rate specified in Article 12, Section 2 presently in effect. A casual or temporary employee is one who, hired for the day, and without promise of continued employment, is terminated upon the completion of the day. A part-time employee is one who normally has a regular job elsewhere. A seasonal employee may be hired at the rate of $1.50 per hour less than the helpers rate specified in Article 12, Section 2, presently in effect. A seasonal period customarily between May 15th and September 15th. With respect to seasonal employees the company agrees that, within 31 days following employment a seasonal employee shall not be permitted to work unless, or until, he submits to the company official proof supplied by the Union that he has become a member or has applied for membership in the Union. Whenever any of the above mentioned employees are required to drive such employees shall receive the rate of pay specified for that classification, specified in Article 12, Section 2.

Section 12.3. The rights provided to the Company by Section 12.2 shall be withdrawn to any Company which has been found by the Union to have abused such rights.

Section 12.4. Whenever an employee classified as a helper works as a driver, packer, or warehouseman, he shall be compensated at the driver's, packer's or warehouseman's rate for all hours he is so working. An employee who works six (6) calendar months or more in a calendar year in a higher classification shall be paid the rate for such classification for all hours he works thereafter.

ARTICLE XIII HEALTH AND WELFARE BENEFITS

Section 13.1. Effective March 1, 1976, the Employer shall contribute to the Central States, Southeast and Southwest Areas Health and Welfare Fund, which is to be administered jointly by the parties thereto, the sum of Sixteen Dollars and fifty cednts ($16.50) a week; effective March 1, 1977, Nineteen Dollars ($19.00) a week; effective March 1, 1978, Twenty-one Dollars and fifty cents ($21.50) a week for each employee covered by this Agreement who has been on the payroll sixty (60) days or more, after completing his probationary period as provided for in Section 4.2.

Section 13.2. The Employer presently making payments to the Central States, Southeast and Southwest Areas Health and Welfare Fund, and the Employers who may subsequently begin to make payments to such fund shall continue to make such payments for the life of this Agreement.

Section 13.3. By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties to the Health and Welfare Fund referred to in Section 13.1 to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such trustees within the scope of their authority.

Section 13.4. If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence,

the Employer shall continue to make the required contributions for a period of four (4) weeks. If an Employee is injured on the job, the Employer shall continue to pay the required contributions until such Employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an Employee is granted a leave-of-absence, the Employer shall collect from said Employee, prior to the leave-of-absence being effective, sufficient monies to pay the required contributions into the Health and Welfare Fund during the period of absence.

Secton 13.5. Contributions to the Health and Welfare Fund must be made for each week on each regular Employee, even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other Health and Welfare Fund.

Section 13.6. Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this Article.

The Company further agrees to provide weekly disability each week in an amount not to exceed $125.00 a week when combined with Workmen's Compensation for those weeks up to in which the employee has been found by the Workmen's Compensation Commission to be eligible for compensation under the law.

ARTICLE XIV PENSIONS

Effective March 1, 1976, the Employer shall contribute to a Pension Fund the sum of Seventeen Dollars ($17.00) per week for each regular employee covered by this Agreement who has been on the payroll sixty (60) days or more after becoming a regular employee.

Effective March 1, 1977 the Employer shall contribute to a Pension Fund the sum of Nineteen Dollars and fifty cents ($19.50) per week for each regular employee covered by this

Agreement who has been on the payroll sixty (60) days or more, after completing his probationary period as provided for in Section 4.2.

Effective March 1, 1978 the Employer shall contribute to a Pension Fund the sum of Twenty-two dollars ($22.00) per week for each regular employee covered by this Agreement who has been on the payroll sixty (60) days or more, after completing his probationary period as provided for in Section 4.2.

This Fund shall be the Central States, Southeast and Southwest Areas Pension Fund. There shall be no other pension fund under this contract for operations under this contract or for operations under the Southwest and Southeast Areas contracts to which Employers who are party to this Contract are also parties.

By execution of this Agreement, the Employer authorizes the Employers' Associations which are parties hereto to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the Employer Trustees under such Agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an employee is granted a leave-of-absence, the Employer shall collect from said employee prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

Contributions to the Pension Fund must be made for each week on each regular employee even though such employee may work only part-time under the provisions of this contract, in-

cluding weeks where work is performed for the Employer but not under the provisions of this Contract, and although contributions may be made to the Pension Fund.

Employees who work part-time, temporarily, or in cases of emergency, under the terms of this contract, shall not be covered by provisions of this Article; and provided further, Employer shall not be obligated to pay on any employee who does not perform 25 hours of work in any week. However, the employer agrees to make contributions for each regular employee on the basis of a minimum of 35 weeks in any year.

ARTICLE XV VACATIONS

Section 15.1. Any employee employed for one (1) year by the same Company shall be entitled to a one-week vacation with pay. Any employee employed for three (3) consecutive years by the same Company shall be entitled to a two (2) week vacation with pay. Employees employed for seven (7) consecutive years by the same Company shall be entitled to three (3) weeks vacation with pay. An employee employed for thirteen (13) consecutive years by the same company shall be entitled to four (4) weeks vacation with pay.

However, no employee shall receive a paid vacation unless he has worked a total of 1200 hours for one Company in the year immediately preceding the date of his eligibility for such vacation. Time lost due to sickness or accident shall be considered as time worked toward 1200 hour qualification.

Employers who leave the service of the Company, after completing one (1) full year of service shall receive a pro-rata vacation on the basis of one-twelfth (1/12) of his earned vacation for each month of completed service after his anniversary date.

For the purpose of this Article a week's pay shall be an amount equal to forty-five (45) times the hourly rate for his permanent classification of work.

Section 15.2. Vacations shall be given according to seniority, and cover the entire year giving due regard to employees anniversary date and his expressed desire and to the needs of the Company's business.

Section 15.3. While on a paid vacation, an employee shall not perform work for the Company or for any other Company covered by this Agreement.

Section 15.4. Vacation pay shall be paid on the last pay day prior to the beginning of the vacation period.

Section 15.5. Vacation schedules for employees shall be posted in a conspicuous place at least sixty (60) days prior to the scheduled dates.

Section 15.6. If a holiday falls during an employee's vacation he shall be given an additional day of vacation with pay.

Section 15.7. An employee who withholds selection of his vacation schedule beyond the date set by the Company shall be given the last choice to select his vacation.

Section 15.8. An employee who chooses to split his vacation shall, upon selection of his first choice of time off, wait until all other employees in the Company who are eligible have exercised their choices of vacation dates.

ARTICLE XVI MAINTENANCE OF STANDARDS

Section 16.1 The Company agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the minimum standards in effect in the Company's place of busines at the time of the signing of this Agreement and that wherever any of the terms of this agreement said improvements shall be made by the Company.

Section 16.2. In case of individual Company hardship with respect to the application of this Article for the duration of this Agreement, this Article may be waived or modified in its ap-

plication to all or any employees of such Company, provided the Company, its employees, and the Union agree to such waiver or modification.

Section 16.3. The Company agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void.

ARTICLE XVII MILITARY LEAVE

Employees enlisting or entering the military or naval service of the United States, pursuant to the provisions of the Selective Service Act of 1948, shall be granted all rights and privileges provided by the Act.

ARTICLE XVIII PRESCRIPTICARE

Section 18.1. The Employer shall contribute to the Teamsters Local 610 Prescripticare Trust Fund (or to a designated insurance agency), which is to be administered jointly by the parties thereto, the monthly sum specified in the following schedule for each employee covered by this Agreement who has been on the payroll thirty (30) days or more.

EFFECTIVE	MARCH 1, 1976	$6.00 Per Month
EFFECTIVE	MARCH 1, 1978	$6.50 Per Month

Section 18.2. Employers presently making payments to Teamsters Local 610 Prescripticare Trust Fund (or to a designated insurance agency), and Employers who may subsequently begin to make payments, shall continue to make such payments for the life of this Agreement.

Section 18.3. By the execution of this Agreement, the Employer authorizes the Employers' Association which are parties hereto to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the

Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such trustees within the scope of their authority.

Section 18.4. If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of two (2) months. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions during the period of absence.

Section 18.5. Contributions to the Trust Fund (or to a designated insurance agency) must be made for each month on each regular employee, even though such employee may work only part-time under the provisions of this Contract, and although contributions may be made for those months where work is performed for the Employer but not under the provisions of this Contract, and although contributions may be made for those months into some other Fund.

Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this paragraph.

Section 18.6. The intent of this Article is to provide those benefits outlined in the Trust Agreement creating the Teamsters Local 610 Prescripticare Trust Fund and the parties hereby agree that any language change in this Article necessary to be in compliance to provide those benefits shall be agreed to and incorporated as though fully set out herein, as long as the basic intent of this Article is not changed by any additional, or modified language, and further that the schedule of payments may not be altered during the term of this agreement, by such automatic language change.

ARTICLE XIX UNION RESPONSIBILITY

Section 19.1. The Union recognizes the responsibility imposed upon it as the exclusive bargaining agent of the employees and realizes that, in order to provide maximum opportunities for employment, good working conditions, and fair wages, and Company must render service to the public at the lowest possible cost consistent with the terms of this Agreement.

Section 19.2. The Union agrees to cooperate with the Company and support its efforts to insure a full day's work on the part of the employees covered hereby and that it will support the Company in its efforts to strengthen good will between the Company, the customer, and the employee.

ARTICLE XX GENERAL PROVISIONS

Section 20.1. **Employee Liability for Loss or Damage:** Employees may be charged for loss or damage to equipment or to household goods if the damages result from violation of the Company instructions, from lack of precautions, which a person of the same or similar experience would be expected to observe, or in spite of previous warnings or reprimands in regard to the same or similar circumstances.

Section 20.2. **Bonds:** Should the Company require any employee to give bond, cash bond shall not be compulsory, and any premium involved shall be paid for by the Company. The primary obligation to procure the bond shall be on the Company. If the Company cannot arrange for a bond, it must so notify the employee in writing. The employee then shall be allowed thirty (30) days from the date of such notice to make his own bonding arrangements, but the Company shall not be obligated to keep him working during such period; standard premiums only on said bond shall be paid by the Company and any excess premium shall be paid by the employee. A standard premium shall be that premium paid by the Company for bonds applicable to all other of its employees in similar classifications.

Section 20.3. **Examinations:** Physical, mental, or other examination required by a city, state or federal government body, or by the Company shall be promptly complied with by all employees; provided, however, the Company shall pay for all such examinations. Examinations are to be taken at the Employee's home terminal and are not to exceed one in any one (1) year, unless otherwise required by law, rule or regulation of any city, state or federal governmental regulatory body.

The Company reserves the right to select its own medical examiner or physician, and the Union may, if in its opinion it thinks an injustice has been done to an employee, have said employee re-examined at the Union's expense.

Section 20.4 **Personal Identification:** Should the Company find it necessary to require employees to carry a record of full personal identification, such requirement shall be complied with by the employees. The cost of such personal identification shall be paid for by the Company.

Section 20.5 **Unsafe Equipment:** No employee shall be compelled to take out equipment that is not mechanically sound and properly equipped to conform with all applicable city, state and federal regulations.

Section 20.6 **No Unauthorized Riders:** No driver shall allow anyone other than employees of the Company who are on duty to ride on his truck, except with the written authorization of the Company.

Section 20.7 **Uniforms:** If the Company requires its employees to wear uniforms, the Company shall pay the cost of the same, and the uniforms must bear a Union label. It shall be the duty of the employees to keep the uniforms clean.

Section 20.8 **Transfer from Company to Company:** No employee covered by this contract shall be temporarily transferred from the payroll of one Company to that of another without prior approval and consent of both the Union and the Com-

pany. The section shall not be so contrued, however, as prohibiting any employee from performing services for a company other than his Employer so long as such employee remains on the payroll of his employer for such time also worked for another Company, provided all regular employees of the Company receiving the transferred employees are working.

SEction 20.9 **Failure to Report for Work:** Employees are expected to report for work at their scheduled starting time.

Section 20.10 **Post Contract:** A copy of this agreement shall be posted in a conspicuous place.

Section 20.11 **Agent's Access to Company Office:** Representatives of the Union shall have admission, upon application to the Company, to the office of the Company at any time during working hours for the purpose of ascertaining whether or not this agreement is being observed by the parties hereto, or for the purpose of assisting in the adjustment of grievances, provided that such activity does not interfere with, obstruct, or take the time of employees as they work.

Section 20.12 **No Discrimination:** There shall be no discrimination of any kind against any member of the Union by the Company or any representative in its employ.

Section 20.13 **Bulletin Board:** The Union shall have the privilege of posting on the bulletin board provided by the Company all notices of union meetings and any other matter pertaining to official union business as approved by the Company.

Section 20.14 **Inspection of Payroll Records:** The Company agrees to make available for inspection within five (5) days after written request by the Union, its payroll records with respect to any employee covered by this Agreement about whom a specific grievance has been filed. The Company shall not be considered as having violated the terms of this agreement should it refuse a request for such inspection before the opening of its business hours or after the close thereof, or on a Saturday, Sunday, or

Holdiay. The Company agrees to open its payroll records with respect to the employees covered herein, when the Union by an independent audit, have reason to believe that the contract has or is being violated.

Section 20.15 **Charge on Hourly Basis:** All local moving where origin and destination is within the St. Louis Metropolitan Area (except five pieces or less, and except services rendered to any department of the Federal Government), shall be done on the hourly basis. Any approximating, estimating or guaranteeing of times shall be a violation of this contract.

Section 20.16 **Liability by Individual Company:** It is understood that any liability for the payment of any sums of money or any other liability which devolves upon any individual company covered by this agreement by virtue of any of the provisions of this agreement, will be borne and discharged by that individual company and is not and will not be assumed by or imposed upon any of the other companies covered by this agreement, nor does any one company covered by this agreement assume any responsiblity, liability or an obligation of any other company.

ARTICLE XXI DIRECT BREACH OF CONTRACT

In the event that the Company clearly, deliberately and willfully violates the monetary provisions of Article XI, Article XII, Article XIII, or Article XIV, and fails to comply with any of the aforesaid articles, five (5) days after written notice given to the Company by the Union by certified mail, the Union shall be free to use its economic power to enforce this contract.

ARTICLE XXII SEPARABILITY AND SAVINGS CLAUSE

If any article or section of this contract or any riders thereto should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if complieance with or enforcement

of any article or section should be restrained by such tribunal pending a final determination as to its validity, the remainder of this contract and of any rider thereto, or the application of such article or section to persons or circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of has been restrained, shall not be affected thereby.

ARTICLE XXIII FUNERAL LEAVE

An employee shall be paid for any absence from his scheduled work day, Monday through Friday, made necessary to attend the funeral on account of death in the immediate family, up to and including a maximum of three (3) such days, on the basis of eight (8) hours at straight time for each day of such absence. For the purpose of this article, immediate family means mother, father, spouse, brother, sister, a child of the employee, and mother- in-law, father-in-law, brother-in-law, and sister-in-law. The Company may request proof of the bona-fide nature of the necessary absence, including the occurrence of the death, the relationship of the employee to the deceased, and the employee's attendance at the funeral.

ARTICLE XXIV JURY DUTY

When regular employees covered by this Agreement are called upon for jury duty, they shall promptly advise their employer upon receipt of such call, and, if taken from their work for such service, shall be paid eight (8) hours pay at their regular hourly rate less pay received from above duty, for each day of absence from work occasioned thereby. A maximum of ten (10) days jury duty will be allowed during the life of this Agreement.

ARTICLE XXV TERMINATION

This Agreement shall become effective as of the first day of March, 1976 and shall remain in full force and effect until the 28th day of February, 1979, and each year thereafter, unless

written notice of termination or desired modification is given at least sixty (60) days prior to any yearly expiration date by either of the parties hereto.

Should notice of termination or desired modification be given in the manner provided for above, the party desiring the same shall:

1. Offer to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification.

2. Notify the Federal Mediation and Conciliation service within thirty (30) days after such notices of the existence of a dispute, and simultaneously therewith notify any state agency established to mediate disputes within the state provided no agreement has been reached by that time.

3. Continue in full force and effect, without resorting to strike or lock-out, all the terms and conditions of this agreement for a period of sixty (60) days after such notice is given or until the expiration date of this contract, whichever occurs later. In the process of bargaining in good faith, for a new contract ora contract containing the desired modifications, the parties recognize the fact that it may be necessary to continue their negotiations after the date upon which this agreement legally terminates and in order to provide for their duties and obligations for the period of time between the termination date of this contract and the date upon which they conclude a new contract or one containing the desired modifications, it is understood and agreed as follows:

1. The parties shall continue to bargain and negotiate in good faith in an effort to reach a complete agreement and understanding covering the terms and provisions of a new contract to take the placeof this one or a contract containing the desired modifications, and such negotiations shall continue until either a complete agreement and understanding is reached or until either or both parties conclude that it is not probable that further negotiations will result in agreement.

2. All of the terms and provisions of this contract shall be continued in full force and effect and extended from the termination date hereof, to such time as the parties either enter into a new agreement or agreement containing the desired modifications, or terminate further negotiations in the manner above mentioned.

3. Should the parties reach an agreement upon the terms and provisions of a new contract or a contract containing the desired modifications, at a time subsequent to the termination date of this contract, then, in such event all of the terms and provisions of the new contract, or the contract containing the desired modifications, shall be made retroactive to the termination date of this contract.

The Post Office Address of _____
is _____.

The Post Office Address of the Union is 300 South Grand Boulevard, St. Louis, Missouri, 63103.

IN WITNESS WHEREOF, the parties hereto have signed and executed this and several other copies hereto, the day and year first above written.

COMPANY Schneider Mov. &
Stge. Co.
6400 Spencer Pl.
St. Louis, Mo. 63133

By: Illegible

MISCELLANEOUS DRIVERS
AND HELPERS LOCAL UNION
NO. 610, affiliated with the
International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and Helpers of America

By: Glen Bayer, Bus. Rep.

EMPLOYEES COMMITTEE

Roger Goray
Charles Peterson
James Bradbury
James Henry
William Roland
Willie Furnace